

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of
TRANSAMERICA CORPORATION and in behalf of all other share-
holders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI, A. H. GIANNINI,
AMADEO P. GIANNINI (as Executor of the Last Will and Testa-
ment of Virgil D. Giannini, Deceased), BANK OF AMERICA
NATIONAL TRUST & SAVINGS ASSOCIATION, a national
banking association (as Administrator-with-the-Will-Annexed of the
Estate of John M. Grant, Deceased), GORDON GRAY, O. D. HAM-
LIN, T. W. HARRIS, A. P. JACOBS, F. C. STEVENOT, RUSS
AVERY, P. A. BRICCA, GEORGE J. DE MARTINI, W. N. LAGO-
MARSINO, A. J. SCAMPINI, WILLIAM E. BLAUER, LEON
BOCQUERAZ, E. H. CLARK, CHARLES N. HAWKINS, W. F.
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ANDO PEDRINI, GEORGE A. WEBSTER, E. J. NOLAN, C. R.
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SCHER, CLIFFORD P. HOFFMAN, C. J. SMITH, VERNON C.
WALSTON, AMADEO P. GIANNINI, L. M. GIANNINI and
CLAIRE GIANNINI HOFFMAN, transacting business as co-partners
under the firm name and style of WALSTON & CO., and AMADEO
P. GIANNINI (as the Executor of the Last Will and Testament of
Virgil D. Giannini, a deceased member of said co-partnership),
WALSTON & CO., a co-partnership and TRANSAMERICA COR-
PORATION, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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Virgil D. Giannini, a deceased member of said co-partnership),
WALSTON & CO., a co-partnership and TRANSAMERICA COR-
PORATION, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

Prefatory Statement.

This is an appeal from a judgment of dismissal, made
and given by the United States District Court for the
Southern District of California, Central Division, entered
and docketed on June 9th, 1943, pursuant to an order

granting the defendants' several motions to dismiss plaintiff's second amended complaint. [Tr. 448, 449, 450, 451.]

The plaintiff is a shareholder of the defendant "Transamerica Corporation" and the defendants were, at the various times mentioned in said complaint, its directors and principal officers.

The plaintiff by her action, on behalf of herself and other shareholders, seeks to have a trust relationship judicially established wherein the defendants are trustees and the defendant "Transamerica Corporation" and its shareholders are beneficiaries; that the defendants as such trustees be required to account for certain secret profits acquired and corporate losses occasioned by their wrongful acts, and judgment against them, for the use and benefit of the defendant "Transamerica Corporation," for the balance found due by such accounting, together with costs and counsel fees. [Tr. 188, 189.]

The action was filed April 16, 1941. [Tr. 24.]

Jurisdictional Statement.

The District Court.

The jurisdiction of the District Court of the Southern District, Central Division of California, is sustained by Section 24 (1) (B) of the Judicial Code as amended (28 U. S. C. A. 41).

The jurisdiction of said District Court is further sustained by Section 52 of the Judicial Code (28 U. S. C. A. 113).

The pleadings necessary to show, and which establish, the existence of the jurisdiction of said District Court are as follows:

The plaintiff's second amended complaint, Paragraphs V and VI [Tr. 146], Paragraph VIII [Tr. 147], Paragraph X [Tr. 148], Paragraph XIII [Tr. 149], Paragraph XIV [Tr. 149], and Paragraph XVII [Tr. 150].

The Circuit Court of Appeals.

The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Section 128 (a) (d) of the Judicial Code as amended (28 U. S. C. A. 225) (a) (d). The jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, of this appeal, is further sustained by plaintiff's compliance with Rule 73 of the Federal Rules of Civil Procedure.

The proceedings and documents which sustain the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, of this appeal, are as follows:

1. The final judgment of dismissal of the plaintiff's action, from which this appeal is taken, which was entered and docketed on June 9, 1943. [Tr. 448, 449, 450 and 451.]

2. Plaintiff's "notice of appeal," provided by subdivision (a) and (b) of Rule 73 of the Federal Rules of Civil Procedure, filed September 7, 1943. [Tr. 451, 452.]

3. Plaintiff's "Designation of contents of record on appeal" filed with the District Court on September 13, 1943, pursuant to subdivision (a), Rule 75 of the Federal Rules of Civil Procedure. [Tr. 494, 495, 496, 497.]

4. Plaintiff's "Points upon which she intends to rely on the appeal" filed September 17, 1943, pursuant to subdivision (d) of Rule 75 of the Federal Rules of Civil Procedure. [Tr. 492, 493, 494.]

Statement of the Case.

The admitted facts in this case are set forth in plaintiff's second amended complaint [Tr. 143 to 192], which we summarize as follows:

Note:

(1) The defendant "Transamerica Corporation" with its corporate subsidiaries, departments and instrumentalities will for convenience hereinafter be mentioned as the "defendant corporation."

(2) The conspiring individual defendants and other persons will be mentioned in this statement as the "conspirators."

The Parties.

The plaintiff was a shareholder of the "defendant corporation" at the time of each and all of the transactions of which she complains. [Tr. Para. XVIII, p. 150.]

The individual defendants with the exception of Vernon C. Walston, William S. Hoelscher, C. J. Smith, Clifford P. Hoffman, Claire Giannini Hoffman and Virgil D. Giannini (now deceased), at the times mentioned in the complaint, and between October 11, 1928 and August 17, 1942, were the directors and principal officers of the "defendant corporation." [Tr. Para. XXII, pp. 157, 158, 159.]

Certain other persons, not named as defendants, who conspired with the defendants and participated in their wrongful acts were, at the times mentioned in said complaint, and between January 8, 1929 and August 17, 1942, also directors of the "defendant corporation." [Tr. Para. XXIII, pp. 160, 161.]

The defendant Walston & Co., a co-partnership, mentioned and described in Paragraphs VII and VIII of the complaint [Tr. 147], was one of the agencies used by the individual defendants in committing certain of the wrongful acts to effect the object of the conspiracy. [Tr. Paras. XXX, XXXI, XXXII, XXXIII, pp. 169, 170, 171, 172, 173.]

The individual defendants, who were not directors nor officers of the "defendant corporation," to-wit, Vernon C. Walston, William S. Hoelscher, C. J. Smith, Clifford P. Hoffman, Claire Giannini Hoffman and Virgil D. Giannini (now deceased), together with the defendants Charles De Y. Elkus, Amadeo P. Giannini and L. M. Giannini, who were directors and officers of "defendant corporation," constitute the individual members of said defendant co-partnership Walston & Co. [Tr. Para. VII, p. 147.]

The defendant Bank of America National Trust & Savings Association is and has been since on or about March 25, 1941, the administrator with the will annexed of the estate of John M. Grant (now deceased), who was one of the participants in the conspiracy and the wrongful acts pursuant thereto as set forth in the complaint. [Tr. Para. XII, p. 148; Para. XIX, p. 150.]

The defendant Amadeo P. Giannini, is and has been since on or about the 28th day of April, 1938, the executor of the last will and testament of Virgil D. Giannini (now deceased), who was also one of the persons who participated in the conspiracy and the wrongful acts pursuant thereto as set forth in the complaint. [Tr. Para. XI, p. 148; Para. XIX, p. 150.]

The "defendant corporation," for whose benefit this action is maintained, has been since on or about October

11, 1928, and still is a *Delaware corporation* transacting business within the state of California, with its principal place of business and office in said state in the City and County of San Francisco and engaged in conducting numerous business enterprises by and through other corporations and associations as its corporate subsidiaries, departments and instrumentalities. [Tr. Paras. I and II, pp. 144 and 145.]

The Conspiracy.

On or about the 11th day of October, 1928, the “conspirators” entered into a “conspiracy agreement” to control, operate and use the “defendant corporation” for their private, personal and individual gain and to the detriment of the corporation and its shareholders, and, for such purpose to misappropriate its corporate funds, assets and property and use the same together with their official positions and the confidential and special knowledge gained thereby, for their private and individual secret profit.

As part of the conspiracy the “conspirators” also agreed by and between themselves as follows:

(a) They should, at all times, obtain and maintain control of the issued and outstanding voting shares of the capital stock of “defendant corporation,” and by virtue thereof, elect, maintain control of, and dominate all of the individual members of all its Boards of Directors, and all its principal officers and also control, dominate, dictate, determine and direct all its business affairs and policies.

(b) A majority of or all the individual members of all Boards of Directors and a majority or all of the principal officers of “defendant corporation” should at all times be

elected and maintained from the membership of said conspiracy; and in the event any individual member of such Boards of Directors should not become a member of said conspiracy that he should at all times be completely dominated by the conspirators to the extent that each non-conspiring member should be a puppet or dummy for and the *alter ego* of said “conspirators” and, in the performance of his official duty and all his corporate acts, respond completely to the will and desire of said conspirators, and exercise no independent judgment nor discretion concerning the same.

(c) By and through such Boards of Directors the “defendant corporation” should be caused to apply and use its funds, property and facilities to organize, acquire, finance and maintain, various private, personal and individual business enterprises to be owned and conducted by and for the personal and private interest and secret profit of the conspirators or some of them.

(d) By and through such Boards of Directors the “defendant corporation” should be caused to assume or enter into fraudulent and pretended contracts, purporting to evidence valid transactions with, and legal rights of, the conspirators, or some of them, to be used as subterfuges, and to give color of right to transactions whereby large and substantial sums of money belonging to the “defendant corporation” be withdrawn and converted, by said conspirators, or some of them, to their private secret use and profit.

(e) The “conspirators” should, by the use of their official positions with the defendant corporation, and the confidential and special knowledge gained thereby, manipulate

the capital stock of "defendant corporation" upon various national securities exchanges, engage in secret and private speculations therein, and the acquirement of secret and private profit thereby, and to effect such objects, such boards of directors should cause the "defendant corporation" to apply and use its funds and property to finance all such manipulations and speculations, pay all expenses thereof, and the losses sustained thereby.

(f) By and through such boards of directors, the investment, security brokerage and other businesses of said "defendant corporation" should be diverted and transferred to other corporations, associations and co-partnerships which should be secretly organized, acquired, owned and operated by the "conspirators," or some of them, for their individual use and private secret profit.

(g) In order to give the corporate acts, to be performed in the execution of the conspiracy, the appearance of ordinary routine business and not transactions of such importance as to require the careful consideration of all of the members of the board of directors, and that said transactions should not have the appearance of being the result of a carefully planned scheme, some of the directors of the "defendant corporation" should propose and affirmatively present the authorization of such acts, and as long as a quorum of the Board was present, others of said conspiring directors, should passively acquiesce therein by remaining absent from the meetings when and where such corporate acts were to be authorized.

(h) Each and all of the corporate acts deemed necessary by the conspirators, to effect the common design of the conspiracy, should, at all times, be covered, disguised and concealed from all shareholders and directors of de-

defendant Transamerica Corporation other than the conspirators, and to effect such concealment, such acts should fail to truthfully appear upon, or be reflected by, the corporate records and books of account of "defendant corporation," but on the other hand, should be entirely withheld therefrom, or included therein under, and camouflaged by, false, fictitious, untrue, and misleading names, designations, and accounts, wherein and whereby the private, and secret interests of the conspirators therein, should be completely concealed.

(i) In the event the conspirators, for any particular year, or other period of time, should fail to maintain a control of the voting shares of the capital stock of the "defendant corporation," and the election and maintenance of its directors, then, nevertheless, the conspiracy should not terminate, but thereafter the conspirators should attempt to regain control of such stock of the "defendant corporation," and if successful in so doing, then said conspiracy and the common design thereof should continue to exist, be effective as originally agreed, and should continue indefinitely until completely and successfully terminated. [Tr. Para. XIX, pp. 150-156.]

The Wrongful and Overt Acts.

For the purpose of effecting the conspiracy and accomplishing its common design the conspirators committed and performed the following acts and engaged in the following transactions and series of transactions, each of which was committed and performed for their own private and individual benefit with *intent* to enhance their personal and individual interests and unjustly enrich themselves, or

some of them from secret profits and private gain to the detriment of the "defendant corporation" and its shareholders. [Tr. Para. XX, p. 156 and Paras. XXVI, p. 163; XXVII, p. 166; XXVIII, p. 168; XXX, p. 170; XXXI, p. 171; XXXII, p. 172; XXXV, p. 175; XXXVI, p. 177; XXXVII, p. 179 and XXXIX, p. 182 (losses).]

1. Commencing October 11, 1928, and to and including August 21, 1942, the date upon which the plaintiff's second amended complaint was filed, the "conspirators," during all such times, procured, held, and exercised complete control of all of the issued and outstanding voting shares of capital stock of "defendant corporation," and by such control named and elected all the individual members of its Boards of Directors and completely controlled, and directed its entire business policies and affairs. [Tr. Para. XXI, pp. 156, 157.]

2. By and through the control of said stock, each of the individual defendants was from time to time elected a member of "defendant corporation's" board of directors, accepted and assumed the corporate duties and liabilities thereof, and served and acted as such director for certain periods of time between October 11, 1928 and August 21, 1942. [Tr. Para. XXII, pp. 157, 158, 159.]

3. By and through the control of said stock certain other "conspirators," not named as defendants, were from time to time also elected members of "defendant corporation's" board of directors, accepted and assumed the corporate duties and liabilities of such office and served and acted as directors for certain periods of time between January 8, 1929 and August 21, 1942. [Tr. Para. XXIII, pp. 159, 160, 161.]

4. At all times commencing October 11, 1928 and to and including August 21, 1942, each of the individual members of *all* boards of directors of "defendant corporation" who did not become a member of the conspiracy, was a puppet, dummy and the *alter ego* of the conspirators and by them completely dominated to the extent, that in the performance of his official duties and in all his corporate acts, he exercised no independent judgment or discretion but responded to and reflected the will and desire of the conspirators. [Tr. Para. XXIV, p. 161.]

5. On or about the 25th day of May, 1929, the conspirators caused the "defendant corporation" to acquire all of the capital stock and assets of a certain corporation known and described as "Bancitaly Corporation" and to *assume its liabilities* including a certain salary agreement then existing by and between the defendant Amadeo P. Giannini and said Bancitaly Corporation to the effect that for his personal services to be rendered as president of said corporation he should be paid "5% of the net profits of said corporation, per annum, with a guaranteed minimum of \$100,000 per annum," and certain "credit entries" resulting therefrom aggregating approximately \$925,000.00 then upon the books of account of said corporation in favor of defendants Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini (now deceased).

The acquirement of the capital stock and assets of said "Bancitaly Corporation" and the assumption of its liabilities by the "defendant corporation" was caused by the "conspirators" for the purpose and with the intent of each of them to thereafter use said "salary agreement" and "credit entries" as subterfuges and instrumentalities through which to unjustly enrich themselves and enhance

their personal and individual interests, and particularly to enhance the personal and individual interests of the defendants Amadeo P. Giannini and L. M. Giannini and said Virgil D. Giannini (now deceased), to the detriment of the “defendant corporation” and its shareholders in the following particulars:

(a) “Said salary agreement” had theretofore been created and established by the defendants Amadeo P. Giannini, P. C. Hale and James A. Bacigalupi as a fictitious liability of said “Bancitaly Corporation” and had been used as a subterfuge evidencing apparent legal rights with which to wrongfully obtain, appropriate and convert the funds of said corporation to the individual gain of defendants Amadeo P. Giannini and L. M. Giannini and said Virgil D. Giannini (now deceased), *by computing the net profits of said corporation upon fictitious, unearned and unrealized profits.* [Tr. Para. XXIV, pp. 162, 163, 164.]

(b) Theretofore, and pursuant to the terms of said “salary agreement” the said “credit entries” which appeared as liabilities of said “Bancitaly Corporation” were each entered upon its books of account and *each item of which, was computed upon fictitious, unearned and unrealized profits.* [Tr. Para. XXVI, pp. 162, 163, 164.]

(c) During a period of time, commencing on or about April 5, 1929, and ending on or about January 11, 1930, pursuant to the terms of said “salary agreement,” the “conspirators” caused the “*defendant corporation*” to make certain fictitious “credit entries,” in favor of the defendants Amadeo P. Giannini and L. M. Giannini and said Virgil D. Giannini (now deceased), in sums aggregating not less than \$3,700,000.00 upon its books of account, as

purported corporate liabilities, the total credit and each item of which was fictitious and untrue *in that the same did not and truly and correctly represent 5% of the actual and true net profits of the defendant corporation for said period of time or any part thereof, but on the other hand was by the "conspirators" and each of them knowingly computed upon fictitious, unearned and unrealized profits.* [Tr. Para. XXVII, pp. 164, 165, 166.]

(d) Between the 5th day of April, 1929, and the first day of January, 1940, the "conspirators" caused the "defendant corporation" to pay to the defendants Amadeo P. Giannini and L. M. Giannini and said Virgil D. Giannini (now deceased), substantial sums of money, aggregating not less than approximately \$3,700,000.00, on account of and by reason of said "credit entries" *assumed from the books of account of said "Bancitaly Corporation" and "credit entries" made and entered upon the books of account of the "defendant corporation,"* among which payments are the following:

\$212,852.59 in and during the year 1930;
\$266,977.71 in and during the year 1931;
\$134,826.58 in and during the year 1932;
\$132,896.92 in and during the year 1933;
\$100,596.24 in and during the year 1934;
\$251,952.03 in and during the year 1935;
\$ 65,914.29 in and during the year 1936;
\$ 58,284.37 in and during the year 1937;
\$ 34,000.00 in and during the year 1938; and
\$ 13,346.28 in and during the year 1939;

and by reason of which the “conspirators” and particularly defendants Amadeo P. Giannini and L. M. Giannini and Virgil D. Giannini (now deceased), were from the funds and assets of the defendants corporation unjustly enriched to the serious and irremediable injury and detriment of “defendant corporation” and its shareholders to the extent of at least \$3,700,000.00. [Tr. Para. XXVII, pp. 164, 165, 166 and Para. XXVIII, pp. 166, 167, 168.]

(e) On or about the 17th day of December, 1932, the defendant L. M. Giannini and said Virgil D. Giannini (now deceased), caused the defendant co-partnership “Walston & Co.” to be organized with the defendants Vernon C. Walston, William S. Hoelscher, C. J. Smith, Clifford P. Hoffman, Claire Giannini Hoffman, Charles de Y. Elkus, Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini (now deceased), as its individual members. [Tr. Para. VII, p. 147; Para. XXX, pp. 169, 170.]

(f) On said 17th day of December, 1932, the “defendant corporation” was and had been actively engaged in and enjoying a substantial and profitable investment, security and brokerage business. [Tr. Para XXX, p. 169.]

(g) Thereafter in and during the years 1933, 1934, 1935, 1936, 1937 and 1938 the “conspirators” caused the “defendant corporation” to transfer and divert all of its investment, security and brokerage business to the defendant copartnership “Walston & Co.” [Tr. Para. XXXI, pp. 170, 171.]

(h) In and during said years 1933, 1934, 1935, 1936, 1937 and 1938, the “conspirators” caused the “defendant corporation” to pay and disburse from its funds to said defendant co-partnership “Walston & Co.” large sums of

money as “brokerage” and other fees with respect to security, corporate stock, and other transactions rendered in connection with the business which had been so diverted and transferred and which belonged to the “defendant corporation,” together with other large sums of money for use as capital for said defendant co-partnership aggregating a total sum of not less than approximately \$548,000.00, all of which was thereafter by said co-partnership and its individual members *knowingly* disbursed to and divided between the “conspirators” and particularly the defendants Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman and said Virgil D. Giannini (now deceased), who were thereby from the funds and assets of the “defendant corporation” unjustly enriched to its detriment in the sum of at least approximately \$548,000.00. [Tr. Para. XXXII, pp. 171, 172.]

(1) During the year 1932 the “conspirators” organized a private trust syndicate, having for its purpose speculative operations in the capital stock of the “defendant corporation” and other stocks and securities by purchasing and selling the same upon the various national stock exchanges of the United States, wherein and whereby one Charles J. Smith and one Margaret Mallory were the trustees thereof and the conspirators the beneficiaries.

During said year 1932 a certain corporation named “Bankitaly Mortgage Company” was operating and conducting a general mortgage, real estate, investment and security brokerage business, including speculative operations in the capital stock of the “defendant corporation” and other stocks and securities, by purchasing and selling the same upon the various national stock exchanges of the United States. [Tr. Para. XXXIV, pp. 173, 174.]

(j) Also during said year 1932 the “conspirators” caused the “defendant corporation” to pay and advance from its funds and property substantial sums of money aggregating not less than approximately \$1,500,000.00 to themselves and in particular to the defendants Amadeo P. Giannini, L. M. Giannini and said Virgil D. Giannini (now deceased), which was thereafter used and disbursed by them *to acquire the controlling interest in the capital stock of said “Bankitaly Mortgage Company”* for the purpose of using said company as an instrument to carry out the “conspirators’” speculative stock operations and also for the purpose of *acquiring capital* for such operations the conspirators caused the “defendant corporation” to pay and advance from its funds and assets substantial sums of money aggregating a total of not less than approximately \$1,500,000.00 to and into the treasury of said “Bankitaly Mortgage Company.” [Tr. Para. XXXV, pp. 174, 175.]

(k) During the year 1932 the “conspirators” caused the name of said “Bankitaly Mortgage Company” to be changed to “Pacific Coast Mortgage Company” and thereafter during the years 1933, 1934, 1935, 1936, 1937 and 1938, by and through said “Pacific Coast Mortgage Company” and by and with the use of the conspirators’ positions with the “defendant corporation” and the confidential and special knowledge and information gained thereby, operated and engaged in speculative operations in the capital stock of the “defendant corporation,” and other stocks and securities, by purchasing and selling the same upon the various national stock exchanges of the United States and during said periods of time said “Pacific Coast Mortgage Company” earned and collected a large and substantial profit aggregating a total of not less than ap-

proximately \$2,000,000.00 which was, from time to time, paid to, received and accepted by the conspirators and by reason of which they were, and each of them was, unjustly enriched and particularly the defendants Amadeo P. Giannini and L. M. Giannini and said Virgil D. Giannini (now deceased), to the detriment of the "defendant corporation" in the sum of at least \$2,000,000.00. [Tr. Para. XXXVI, pp. 176, 177.]

(l) During the years 1933, 1934, 1935 and 1936 the "conspirators," caused the "defendant corporation" to pay and advance from its funds and assets substantial sums of money aggregating a total of not less than approximately \$3,000,000.00 to the said trustees, Charles J. Smith and Margaret Mallory *for use as capital* in operating and conducting the business and affairs of said private and secret trust which was used by said trustees and the conspirators for speculative operations in the capital stock of the "defendant corporation," and other stocks and securities, upon the various national stock exchanges of the United States. [Tr. Para. XXXVII, pp. 178, 179.]

(m) During the years 1933, 1934, 1935 and 1936 the "conspirators," by and through said "trust syndicate," and with the use of their official positions with the "defendant corporation" and the special and confidential knowledge and information gained thereby, engaged in the speculative operations in the capital stock of the "defendant corporation," and other stock and securities, by purchasing and selling the same upon the various national stock exchanges of the United States and during said period of time said "trust syndicate" earned and collected a large and substantial profit aggregating a total of not less than approximately \$300,000.00 which was from time to time paid to,

received and accepted by the “conspirators” by reason of which they were, and each of them was, unjustly enriched, to the detriment of the “defendant corporation,” in the sum of at least approximately \$300,000.00. [Tr. Para. XXXVIII, pp. 179, 180.]

(n) During the years 1932, 1933, 1934, 1935, 1936 and 1937, the “conspirators” in conducting their speculative operations in the purchase and sale of the capital stock of the “defendant corporation” and other stocks and securities, by and through said “trust syndicate” and “Bankitaly Mortgage Company” and “Pacific Coast Mortgage Company” caused the “defendant corporation” to engage in the business of manipulating and stirring the market and creating a demand for its capital stock by soliciting orders for the purchase thereof from the general public, with respect to which, the “defendant corporation” incurred large items of expense and suffered substantial losses aggregating a total sum of not less than approximately \$2,250,000.00. [Tr. Para. XXXIX, pp. 180, 181, 182.]

The Concealment of the Wrongful Acts.

(a) Relating to the “Bancitaly Corporation” transactions including the “salary agreement” and “credit entries” [Tr. Paras. XXVI, XXVII and XXVIII, pp. 162, 163, 164, 165, 166, 167 and 168] all of the corporate acts of the “defendant corporation” with respect thereto, *and its general business and affairs, including its assets, liabilities, payments and disbursements*, were by the “conspirators” made to appear and be reflected by records and books of account kept, maintained and manipulated by an involved, intricate and complex system of accounting in con-

flict with the usual, customary, proper and recognized principles of the science of accounting and entirely beyond the knowledge and understanding of the plaintiff concerning such subjects and at all times covered, disguised, concealed and camouflaged by entries and records made under and by false, fictitious, misleading and untrue names and designations and thereby wholly and entirely concealed. [Tr. Para. XXIX, pp. 168, 169.]

(b) Relating to the "Walston & Co." transactions [Tr. Paras. XXX, XXXI, XXXII, pp. 169, 170, 171, 172], the "conspirators" concealed the same by *withholding* from the corporate records of the "defendant corporation" all reference to said defendant co-partnership and the interests of the conspirators, or any of them, therein and also *withheld* from such records all reference to the acquirement, division and distribution of the earnings and profits of said co-partnership *and which was at all times evidenced by wholly concealed, secret and private agreements and transactions.* [Tr. Para. XXXIII, p. 173.]

(c) Relating to the "Bankitaly Mortgage Company" and "Pacific Coast Mortgage Company" transactions [Tr. Para. XXXIV, XXXV and XXXVI, pp. 173, 174, 175, 176, 177] the "conspirators" concealed the same by failing to make open corporate records thereof in the usual course of business upon the records and books of account of the "defendant corporation" but on the other hand covered, concealed and camouflaged all such transactions by and through purported loans, stock purchases, and other transactions with, secret agents, representatives, and other cor-

porations and associations of the conspirators, including one A. O. Stewart and the A. P. Giannini Company, a corporation. [Tr. Para. XXXV, p. 176; Para. XL, pp. 182, 183.]

(d) Relating to the Smith-Mallory Trust Syndicate transactions [Tr. Para. XXXIV, p. 174 and Paras. XXXVII, XXXVIII, XXXIX, pp. 178, 179, 180, 181, 182], the “conspirators” concealed the same by *withhold- ing* from the corporate records of the “defendant corporation” all information of the relationship of the “conspirators” thereto, and of the secret profits derived therefrom, and the transfer and use of the corporate funds and assets of the “defendant corporation” therein and on the other hand by secretly consummated said transactions through purported loans, other transactions, acts of secret agents and representatives of the “conspirators” and also by failing to conduct such transactions in an open and usual course of business. [Tr. Para XXXVII, pp. 178, 179; Para. XL, pp. 182, 183.]

(e) Relating to *all* the corporate acts of the “defendant corporation” *and its general business and affairs*, including its assets, liabilities, payments and disbursements and involving all of the transactions set forth in subdivisions (a), (b), (c) and (d) hereof, unless the same were entirely withheld from the corporate records, were by the conspirators made to appear and be reflected *by records and books of account kept, maintained and manipulated by an involved, intricate and complex system of accounting in conflict with the usual, customary, proper and recognized principles of the science of accounting and entirely beyond the knowledge and understanding of the appellant with respect to such subjects.*

The Secret Profits and Corporate Losses.

(a) Through the “Bancitaly Corporation,” “salary agreement” and “credit entries” transactions [Tr. Paras. XXVI, XXVII, XXVIII, pp. 162, 163, 164, 165, 166, 167 and 168] the “conspirators” or some of them acquired secret profits *of at least approximately* \$3,700,000. [Tr. Para. XXVII, p. 167.]

(b) From the “Walston & Co.” transactions [Tr. Paras. XXX, XXXI, XXXII, pp. 169, 170, 171 and 172], the “conspirators” acquired secret profits *of at least approximately* \$548,000.00. [Tr. Para. XXXII, p. 172.]

(c) From the “Bankitaly Mortgage Company” and the “Pacific Coast Mortgage Company” transactions the “conspirators” or some of them acquired secret profits *of at least approximately* \$2,000,000. [Tr. Para. XXXVI, p. 177.]

(d) From the Smith-Mallory Trust Syndicate the “conspirators” or some of them acquired secret profits *of at least approximately* \$300,000. and in which transactions the “defendant corporation” was caused *a loss of at least approximately* \$2,250,000.00. [Tr. Para. XXXVIII, p. 180.]

The Alternate and Hypothetical Liability Of Appellees.

Each individual member of *all* the several “boards of directors” of the “defendant corporation” who was not a member of the conspiracy, if any, was a puppet, dummy and the *alter ego* of the “conspirators” and by them at all times completely dominated to the extent that, in the per-

formance of his official duties and in all the corporate acts of the "defendant corporation" and particularly the corporate acts and transactions here involved, said dummy and puppet director exercised no independent judgment or discretion but, at all times, responded to and reflected the will and desire of the "conspirators," and, any individual member of such boards of directors, *who was not a member of said conspiracy nor a puppet and dummy director, either failed to discover any of the wrongful acts of the conspirators or on the other hand, having discovered the same, knowingly and in disregard of his official duty, failed to take action to redress or prevent the continuance of such wrongful acts or to cause such action to be taken.* [Tr. Paras. XXIV and XXV, pp. 161, 162.]

**The Discovery of Suspicious
Circumstances Regarding
Corporate Mismanagement.**

The appellant was, until on or about the 27th day of April, 1939, *wholly ignorant, and had no knowledge, notice or information, of any kind or character concerning the wrongful acts of the "conspirators" nor with respect to any illegal or wrongful conduct of the "conspirators" concerning their management of the assets or of the conduct of the business and affairs of the "defendant corporation,"* but on the other hand reposed full and complete confidence in the integrity and good faith of the defendant Amadeo P. Giannini and each and all of his "co-conspirators" in the management and operation of the assets, business and affairs of the "defendant corporation" *until on or about said 27th day of April, 1939, when, for the first time, a certain "quasi judicial" proceeding pending before the Securities and Exchange Commission of the United*

States, *was called to her attention*, which she thereupon investigated and ascertained, among other things, that the commission had theretofore ordered a hearing for the taking of testimony to determine whether or not the capital stock of the "defendant corporation" should be suspended or withdrawn from certain national stock exchanges by reason of false and misleading statements of material facts including financial statements of the "defendant corporation" which did not correctly reflect its true financial condition and which the commission had reasonable ground to believe had been made in said "defendant corporation's" application for registration of its capital stock upon said stock exchanges. *For the first time* appellant ascertained the charges contained in said "order for hearing," a printed official copy of which is filed herein, as part of appellant's "pleading" *and shows the nature and extent of appellant's first discovery of suspicious circumstances concerning management of the "defendant corporation's" affairs.* [Tr. 417-445.]

With respect to said proceeding and the contents of said order for hearing, appellant, *prior to April 27, 1939, had no notice, knowledge or information of any kind or character whatsoever concerning the same nor did she have any reason to suspect the existence of the charges therein related nor did she have any reason to suspect the "conspirators" or any or either of them of wrong doing concerning the conduct of the business and affairs of the defendant corporation.*

The facts, and other matters set forth in said order for hearing, were developed slowly through certain detailed examinations and audits of the corporate records and books of account of the "defendant corporation" by

expert accountants on behalf of said commission and were presented to said commission by the testimony of unwilling and hostile witnesses through examinations conducted by experienced lawyers and said proceeding is still pending and undetermined. [Tr. Para. XLI, pp. 183, 184, 185 and 186.]

**The Futility of Requesting
Action by the Board of
Directors or Shareholders.**

All of the individual members of the several boards of directors of the "defendant corporation" at all times up to and including the date of the filing of appellant's "pleading" are sued as defendants or otherwise named and charged with the commission of the wrongs involved. At all such times as the "conspirators" herein, had the complete control of the voting shares of the capital stock of "defendant corporation" and exercised such control. The appellant with knowledge of such facts made no demand of the board of directors of "defendant corporation," to institute an action to redress the wrongs involved herein as such an action to be effective and complete, must be directed against all of the "conspirators." That such a demand by appellant upon said the board of directors would be a futile and an idle act. [Tr. Para. XLII, p. 187.]

The total issued and outstanding voting shares of the capital stock of the "defendant corporation" are owned and held by approximately two hundred thousand individuals residing and scattered in substantially all the States and Territories of the United States and numerous foreign countries including Australia, Azores, Belgium, Brazil,

Canada, China, Czecho-Slovakia, Denmark, Dutch East Indies, East Indies, England, France, Greece, Germany, Hawaii, Holland, India, Ireland, Italy, Japan, Mexico, New Zealand, Panama Canal Zone, Palestine, Philippine Islands, Peru, Poland, Porto Rico, Portugal, Roumania, Samoan Islands, Scotland, South Africa, Sweden, Switzerland, Spain and West Indies, and appellant made no demand upon said shareholders as a body to cause action to be taken to remedy the wrongs involved herein or to prevent the continued perpetration thereof as to be effective such a demand would first require an expensive and prolonged struggle with the "conspirators" to wrest from them control of the voting shares of stock of "defendant corporation," which struggle would also be a futile and an idle act.

The Appellees' Motions to Dismiss.

After the filing of the appellant's second amended complaint, without limitation or restriction [Tr. 142] by the court, the appellees, in separate groups, by and through their respective attorneys filed motions to dismiss appellant's action based upon the following grounds:

Note:

In order to avoid error, we have set forth verbatim each ground of each motion to dismiss.

1. By Cosgrove & O'Neil, attorneys for Amadeo P. Giannini, individually and as executor. [Tr. 193, 194, 195.]

(a) Because the second amended complaint fails to state a claim against defendant upon which relief can be granted;

(b) Because the alleged claim set forth in said second amended complaint against defendant is barred by the provisions of Section 388, Subdivision 4 and Section 339, Subdivision 1 of the Code of Civil Procedure of the State of California;

(c) Because the alleged claim set forth in said second amended complaint is barred by the laches of plaintiff in failing to use diligence in the prosecution of said claim and by the long delay in making defendant, as executor, party to this action, which lack of diligence and delay have been highly prejudicial to said defendants;

(d) Because there is a failure to include indispensable parties defendant as parties to the action, to-wit, the subsidiaries of the defendant Transamerica Corporation which are alleged to have suffered injury and detriment by the acts complained of;

(e) Because the court lacks jurisdiction and the second amended complaint fails to state a claim against defendants upon which relief can be granted for the reason that the second amended complaint sets forth certain injury and damage to the subsidiaries of Transamerica Corporation and fails to allege that plaintiff was a stockholder in such subsidiaries or any of them;

(f) Because the complaint consists entirely of sham, irrelevant, redundant and evasive allegations and is not in compliance with the directions of the above court in granting to plaintiff permission to file a second amended complaint and fails to set forth the undisputed facts that on December 9, 1931, the stockholders of Transamerica Corporation, including plaintiff, were sent a letter advising them that A. F. Giannini had received for the compensa-

tion the credits referred to in the second amended complaint and had withdrawn all but \$792,000 thereof and that the board of directors of Transamerica upon advice of counsel had refused to pay defendant A. P. Giannini said balance; and that plaintiff had notice thereafter, in February, 1932, A. P. Giannini was reelected a director and officer of said corporation; and

(g) Because plaintiff has entirely disregarded the directions of this court at the time of the hearing of the motions herein directed to the first amended complaint with regard to setting up her causes of action in separate counts.

2. By Tanner, Odell & Taft in behalf of appellee Herbert E. White. [Tr. 296, 297, 298.]

(a) Because the second amended complaint fails to state a claim against defendant upon which relief can be granted.

(b) Because the alleged claim set forth in said second amended complaint against defendant is barred by the provisions of Section 338, subdivision 4, and Section 339, subdivision 1 of the Code of Civil Procedure of the State of California;

(c) Because the alleged claim set forth in said second amended complaint is barred by the laches of plaintiff in failing to use diligence in the prosecution of said claim and by the long delay in making this defendant a party to this action, which lack of diligence and delay have been highly prejudicial to this defendant.

(d) Because there is a failure to include indispensable parties defendant as parties to the action, to-wit, the subsidiaries of defendant Transamerica Corporation which

are alleged to have suffered injury and detriment by the acts complained of.

(e) Because the court lacks jurisdiction and the second amended complaint fails to state a claim against defendant upon which relief can be granted for the reason that the second amended complaint sets forth certain injury and damage to the subsidiaries of Transamerica Corporation and fails to allege that plaintiff was a stockholder of such subsidiaries or any of them.

(f) Because the complaint consists entirely of sham, irrelevant, redundant and evasive allegations and is not in compliance with the directions of the above court in granting to plaintiff permission to file a second amended complaint and fails to set forth the undisputed facts that on December 9, 1931, the stockholders of Transamerica Corporation, including plaintiff were sent a letter advising them that A. P. Giannini had received for his compensation the credits referred to in the second amended complaint, and had withdrawn but \$792,000 thereof, and that the board of directors of Transamerica upon advice of counsel had refused to pay defendant A. P. Giannini said balance and that plaintiff had notice that thereafter in February, 1932, A. P. Giannini was reelected a director and officer of said corporation.

(g) Because plaintiff has entirely disregarded the directions of this court at the time of the hearing of the motions herein directed at the first amended complaint with regard to setting up her causes of action in separate counts.

3. By Keyes & Erskine, Herbert W. Erskine and Louis Ferrari, in behalf of certain appellees. [Tr. 256, 257, 258.]

(a) Because the second amended complaint fails to state a claim against the said defendants jointly, or against any one or more of them jointly with others, or against any of said defendants severally, upon which relief can be granted.

(b) Because the alleged claim set forth in said second amended complaint against these defendants jointly and severally is barred by the provisions of Section 388, subdivision 4; Section 339, subdivision 1, and Section 343 of the Code of Civil Procedure.

(c) Because the alleged claim set forth in said second amended complaint against these defendants jointly and severally is barred by the laches of said plaintiff in failing to use due diligence in the prosecution of said claim and by the long delay in filing this action, which lack of diligence and delay have been wholly prejudicial to these defendants; and because as to certain of the defendants joining in this motion the plaintiff has been guilty of gross laches and prejudicial delay in not sooner making said defendants parties to this action;

(d) Because there is a failure to include indispensable parties defendant as parties to the second amended complaint in that the subsidiaries of the defendant Transamerica Corporation which are alleged to have suffered the injury and detriment by reason of the matters set forth in said second amended complaint are not named parties therein;

(e) Because the court lacks jurisdiction for the reason that the second amended complaint sets forth certain injury and damage to the subsidiaries of Transamerica and fails to set forth that the plaintiff was a stockholder of such subsidiaries or any of them;

(f) Because the complaint consists entirely of sham, irrelevant, redundant and evasive allegations and is not in compliance with the directions of the above court in granting to plaintiff permission to file a second amended complaint and fails to set forth the undisputed facts that on December 9, 1931, the stockholders of Transamerca Corporation, including plaintiff here were sent a letter advising them that A. P. Giannini had received for his compensation the credits referred to in the second amended complaint and had withdrawn all but \$70,000.00 thereof and that plaintiff had notice that thereafter on February, 1932, A. P. Giannini was reelected a director and officer of said corporation.

(g) Because the said plaintiff has entirely disregarded the direction of this court at the time of the hearing of the motions to dismiss the first amended complaint and with regard to setting up the causes of action in separate counts that others who were directors of the corporation or otherwise participated in the transactions complained of could set forth their defenses that such portions of the complaint as concerned them and would not be called upon to answer or defend against charges made against other defendants with regard to transactions with which they were in nowise concerned.

4. By George D. Schilling and G. L. Berrey for appellee, Bank of America National Trust and Savings Association as Administrator-With-the-Will-Annexed of the Estate of John M. Grant, Deceased. [Tr. 238, 239, 240.]

1. To dismiss the action because the second amended complaint and each cause of action therein attempted to be stated fails to state a claim against this moving defendant upon which relief can be granted. Said motion is based upon the following grounds:

(1) The complaint is generally insufficient to charge the defendants with any wrongful act or omission all the allegations in that behalf being the pleader's conclusions.

(2) The complaint fails to show that any claim has been filed with the defendant Bank of America National Trust & Savings Association as administrator with the will annexed of the estate of John M. Grant, deceased.

(3) The complaint fails to show any demand upon the directors or the stockholders to maintain this action or any valid excuse for failure to make such demand.

(4) The claims set forth in the second amended complaint against this moving defendant are barred by the laches of the plaintiff in failing to use due diligence in the commencement and prosecution of this action, which lack of diligence is prejudicial to this moving defendant.

(5) There is a failure to include as parties defendant or parties plaintiff persons who are indispensable parties to this action in that subsidiaries of the defendant Transamerica Corporation which are alleged to have suffered injury and detriment by reason of matters set forth in the second amended complaint are not named as parties herein.

(6) The court lacks jurisdiction of the subject matter of this action for the reason that the second amended complaint sets forth certain injuries and damages to subsidiaries of Transamerica Corporation and fails to set forth that the plaintiff was a stockholder of such subsidiaries or any of them.

(7) The complaint consists entirely of sham, irrelevant, redundant and evasive allegations and is not in compliance with the directions of the court in granting plaintiff permission to file a second amended complaint.

(8) The plaintiff has wholly disregarded the directions of the court given at the hearing of the motions to dismiss the first amended complaint whereby plaintiff was required to state her causes of action separately.

5. By Bacigalupi, Elkus & Salinger and Claude M. Rosenberg, for certain appellees. [Tr. 283, 284, 285.]

(1) That said second amended complaint fails to state a claim against the moving defendants or any of them upon which relief can be granted for the reason that the alleged claims set forth therein against said moving defendants, jointly and severally are barred by the provisions of Section 338 (4), Section 339 (1) and Section 343 of the Code of Civil Procedure of the State of California.

(2) That said second amended complaint fails to state a cause of action against the moving defendants or any of them upon which relief can be granted for the reason that the alleged claims set forth therein against said moving defendants jointly and severally are barred by laches of plaintiff in delaying unduly the institution of this suit to the prejudice of the moving defendants and each of them.

(3) That there is a failure to set forth with particularity sufficient excuse for plaintiff's admitted failure to endeavor to have the board of directors of Transamerica Corporation bring this action.

(4) That there is a failure to allege an effort by plaintiff to obtain action by the stockholders of Transamerica Corporation or any sufficient excuse for not doing so.

(5) That failure claims are asserted in said second amended complaint founded upon separate and different transactions and occurrences without being stated in sepa-

rate counts, as required by Rule 10 (b) of the Rules of Civil Procedure for the District Court of the United States and contrary to the directions and order of the above entitled court upon the hearing of the motions previously addressed to the first amended complaint herein.

6. By Russ Avery and Gordon Grey for certain appellees. [Tr. 218, 219.]

1. Because the second amended complaint fails to state a claim against these defendants or any of them upon which relief can be granted;

2. Because there is a lack of indispensable parties defendant, to-wit, the subsidiaries of defendant Trans-america corporation which are alleged to have suffered injury and detriment by the acts complained of;

3. Because the alleged claim set forth in said second amended complaint against these defendants and particularly against defendants Theodore M. Stuart and L. M. Giannini, as an alleged partner of Walston & Co. is barred by the provisions of Section 338, subdivision 4 and Section 339, subdivision 1 of the Code of Civil Procedure of the State of California; and

4. Because the alleged claim set forth in said second amended complaint against defendants and particularly against defendants Theodore M. Stuart and L. M. Giannini as an alleged partner of Walston & Co. is barred by the laches of plaintiff in failing to use diligence in the prosecution of said claim and particularly by the long delay in making the defendants Theodore M. Stuart and L. M. Giannini as an alleged partner of Walston & Co. parties to this transaction in the original complaint, lack of diligence and delay have been highly prejudicial to said defendants.

5. Because the court lacks jurisdiction for the reason that the second amended complaint sets forth certain injuries and damage to the subsidiaries of Transamerica Corporation and fails to set forth that the plaintiff is or ever was a stockholder of such subsidiaries or any of them.

6. Because the second amended complaint consists entirely of sham, irrelevant, redundant and evasive allegations of specific facts and is not in compliance with the directions and conditions of the above entitled court in granting to plaintiff permission to file a second amended complaint.

7. Because the plaintiff has completely disregarded the direction of this court at the time of the hearing of the motions to dismiss the first amended complaint requiring the plaintiff to set up her several causes of action in separate counts and that the various defendants whether directors or otherwise, could set forth their several separate defenses to such portions of the second amended complaint as specifically concern them.

Order Granting Motions to Dismiss.

On April 16, 1943, the District Court made its order that each and all of the motions filed on behalf of the respective defendants (appellees) to dismiss the second amended complaint be granted. [Tr. p. 320.]

Final Judgment of Dismissal.

On June 9, 1943, the District Court made and caused to be docketed its final "judgment of dismissal" of appellant's action based only upon its order of April 16, 1943, granting appellees several motions to dismiss [Tr. 448, 449, 450, 451] for the reasons, set forth in the court's "Memorandum of Conclusions," which will be hereafter discussed. [Tr. 321-360.]

SPECIFICATIONS OF ERRORS.

Note:

The appellant's "statement of points" upon which she intends to rely on the appeal and which were filed in the District Court [Tr. 492, 493, 494] were by reference adopted as her "statement of points" required by Subdivision 6 of Rule 19 of this court. [Tr. 516, 517.]

For convenience we group appellant's "specifications of error" in relation to each point so stated.

Point I.

This point [Tr. 492] is in the following language:

"The court's conclusion contained in its memorandum at pages 15 and 16 that:

'While the plaintiff charges that all of the defendants and said forty-four other persons committed fraudulent and illegal acts—recitals which are but legal conclusions—her pleading fails to set forth with particularity the ultimate facts and circumstances constituting the alleged fraud and illegality.'
is erroneous."

The District Court's conclusion set forth in Point I is erroneous in the following particulars:

SPECIFICATIONS.

(a) The plaintiff's second amended complaint does not charge the conspirators with having committed fraudulent and illegal acts by recitals which are but legal conclusions.

(b) Conclusions of a pleader are not improper in averring the circumstances constituting fraud where such conclusions give sufficient particularity to determine the nature of the claim and afford fair notice thereof.

(c) While the result of the acts charged against the conspirators may be considered an actual fraud yet the legal nature of appellant's claim is still one for an accounting of secret profits and corporate losses; and is sufficiently definite to enable the defendants to frame an answer thereto and understand the nature and the extent of the charge.

(d) Allegations of ultimate facts and particular circumstances, relating to fraud and illegality, are unnecessary where such facts and circumstances are or should be peculiarly within the knowledge of the wrongdoers and the evidence thereof under their control.

Point II.

This point [Tr. 492] is in the following language:

“The court's conclusion, contained in its memorandum at page 28, that

‘if the bar of the Statute of Limitations or of laches is to be avoided it will be necessary for plaintiff to plead other facts besides those set forth in her second amended complaint.’

is erroneous.”

The District Court's conclusion set forth in Point II is erroneous in the following particulars:

SPECIFICATIONS.

(a) The bar of the Statute of Limitations does not commence to run against a *concealed fraud* until the actual or legal discovery thereof.

(b) The doctrine of laches does not apply to a *concealed fraud*, nor does it attach until the same is actually discovered.

(c) The doctrine of laches in no event applies unless the delay is shown, by circumstances, to have caused prejudice in some substantial manner. This does not appear upon the face of the second amended complaint. It is a subject only for an affirmative defense and supporting proof.

(d) The facts and circumstances pleaded in the second amended complaint are sufficient to avoid laches and to show diligence on the part of the appellant in commencing the action.

Point III.

This point [Tr. 493] is in the following language:

“The court’s conclusion in referring to the plaintiff’s second amended complaint contained in its memorandum at page 30 that:

‘It is replete with surplusage and repetitions as well as legal conclusions, including numerous recitals, more or less general, vague and indefinite * * *.’
is erroneous.”

The District Court’s conclusion set forth in Point III is erroneous in the following particulars:

SPECIFICATIONS.

(a) The second amended complaint is not replete with surplusage and repetitions which in any manner tend to cloud the nature of appellant’s claim or render the same unduly indefinite.

(b) The second amended complaint is not replete with legal conclusions, nor does it include recitals which are more or less general, vague and indefinite, which in any manner tend to cloud the nature of the appellant’s claim.

(c) Whatever surplusage or repetitions occur, if any, in the averments of the second amended complaint they are insufficient to justify a dismissal of appellant's action.

(d) Legal conclusions and general vague and indefinite recitals, if any, set forth in the second amended complaint, are insufficient to justify a dismissal of appellant's action.

Point IV.

This point [Tr. 493] is in the following language:

"The court's conclusion contained in its memorandum at page 35 that:

'before it can be held that plaintiff has a cause or causes of action against defendants or any of them, and likewise before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint.'

is erroneous."

The District Court's conclusions set forth in Point IV is erroneous in the following particulars:

SPECIFICATIONS.

(a) Matters other than those alleged in the second amended complaint, are unnecessary to justify the filing of appellant's action upon the date it was so filed.

(b) The facts and circumstances alleged in the second amended complaint are sufficient to justify the filing of appellant's action upon the date indicated, and are sufficient to avoid the application of the doctrine of laches and the bar of the Statute of Limitations.

(c) Other matters besides those pleaded in the second amended complaint, are unnecessary in order to avoid a dismissal of the appellant's action.

Point V.

This point [Tr. 493] is in the following language:

“The court's conclusion, contained in its memorandum, page 37, that:

‘each and all of the respective motions to dismiss should be granted.’

is erroneous.”

The District Court's conclusion set forth in Point V is erroneous in the following particulars:

SPECIFICATIONS.

(a) The second amended complaint, under the circumstances of the case, sufficiently sets forth a short and plain statement of the appellant's claim, showing that she is entitled to relief, by simple, concise and direct averments and with sufficient particularity and definiteness to inform the appellees of the nature of appellant's claim and permit the framing of an answer thereto.

(b) The second amended complaint contains averment of all elements necessary to state a claim of the character involved and upon its face discloses no defense thereto.

(c) The second amended complaint was not filed subject to any limitations or restrictions imposed by the District Court with respect to any legal theory or fact nor was it filed contrary to or in violation of any such order or direction.

(d) The corporate subsidiaries, departments and instrumentalities of the defendant corporation are neither necessary nor indispensable parties defendant to appellant's action and their omission as such does not justify a dismissal thereof.

(e) The appellant's claim set forth in the second amended complaint is not barred by subdivision 4 of Section 388 nor by subdivision 1 of Section 339 of the Code of Civil Procedure of the state of California.

((f) The appellant's claim set forth in the second amended complaint is not barred by the laches of appellant in failing to use diligence in the prosecution thereof nor is there any showing upon the face thereof that delay has been in any manner prejudicial to the appellees.

(g) To sustain appellant's action or confer jurisdiction upon the district court, it is unnecessary that appellant be a shareholder of any of the defendant corporation's corporate subsidiaries, departments or instrumentalities.

(h) The court received and considered evidence in deciding and granting the appellee's several motions to dismiss.

(i) The court received and considered evidence in giving a final judgment of dismissal of appellant's cause of action, based only upon the several motions to dismiss.

(j) In an action based upon a tort committed by a person who has since deceased, it is unnecessary to file a claim with his administrators or executors.

(k) The allegations of the second amended complaint show a valid excuse for appellant's failure to make a demand upon the directors or the shareholders of the defendant corporation to institute action for relief.

(l) The allegations of the second amended complaint set forth but a single claim or cause of action and a division thereof into separate counts would be erroneous and obstruct rather than facilitate the clear presentation of the matters set forth.

(m) The mere failure of a director of a corporation to be reelected does not constitute a legal withdrawal from a "continuing conspiracy of all directors" to use the corporate funds and property for secret private gain.

Point VI.

This point [Tr. 493, 494] is in the following language:

"The court's order, contained in the minute order of April 16, 1943, that:

'each and all of the motions filed on behalf of the respective defendants to dismiss the second amended complaint be granted.'

is erroneous."

The District Court's order set forth in Point VI is erroneous in the following particulars:

SPECIFICATIONS.

1. For brevity and convenience appellant hereby refers to and adopts Specifications (a) to (m), inclusive, of Point V as her specifications of error for this point.

Point VII.

This point [Tr. 494] is in the following language:

“The court erred in making and giving the final judgment and decree dismissing plaintiff’s cause of action which was filed and entered June 9th, 1943.”

The District Court’s judgment set forth in Point VII is erroneous in the following particulars:

SPECIFICATIONS.

For brevity and convenience appellant hereby refers to and adopts Specifications (a) to (m), inclusive, of Point V as her specifications of error for this point.

ARGUMENT.

PART ONE.

Relating to Point I [Tr. 492], Specifications (a) to (d) (Br. pp. 35-36), Point III [Tr. 493], Specifications (a) to (d) (Br. pp. 37-38), Point V [Tr. 493], Specification (a) (Br. p. 39), Point VI [Tr. 493, 494], Specification (a) (Br. p. 41), Point VII [Tr. 494], Specification (a) (Br. p. 42).

Note:

1. The parties will hereafter be mentioned as the “appellant” and “appellees.”

2. The second amended complaint will be designated the “pleading.”

3. We limit our argument to the points presented by the appellees’ “motions to dismiss.” No other motion was determined or decided.

4. As the District Court’s “conclusions,” mentioned in Points I and III, each relate to the “form” of the language used in appellant’s “pleading,” we have grouped the same and their “specifications of error,” for this discussion.

5. In this discussion we assume that the court’s “conclusions” and other remarks noted are intended to mean that the language of the “pleading” is so general, vague and indefinite and contains so many legal conclusions as to render it insufficient to state a claim.

* * * * *

As a predicate for our remarks we first direct the court’s attention to the fact that by her action appellant seeks equitable relief, in what is known as a “shareholder’s derivative suit,” by requiring the directors and managing

officers to account to the defendant corporation for secret profits, use of corporate money, and corporate losses. *It is not a common law action to recover money paid or damages based upon numerous independent transactions.* A shareholder of a corporation has no right to maintain such latter action. It is only by a *judicial accounting in equality* that a proper judgment may be rendered which grants the relief appellant seeks.

As hereinafter discussed the “defendant corporation” and its corporate subsidiaries, departments and instrumentalities are, for the purpose of this suit, *a single unit* which in contemplation of law is the “defendant corporation” and of which the appellant was and is a shareholder.

We feel that the character of this action should, at all times, be borne in mind when applying the new rules to the averments of the “pleading.”

Rule 8 of the Federal Rules of Civil Procedure provides among other things as follows:

(a) “A pleading which sets forth a claim for relief * * * shall contain * * *

(2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *.”

(c) (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms in pleadings or motions are required.”

Rule 9 provides among other things as follows:

(f) “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity * * *.”

It seems that the District Court, in granting the several motions to dismiss, has erroneously imposed the obsolete rules of pleading and failed to recognize that under the present rules "legal conclusions" are not prohibited but on the other hand are expressly permitted where they tend to a simple, concise and direct statement of a claim. The "official forms" contained in the Federal Rules of Civil Procedure contains many so-called legal conclusions, which in that respect, illustrate the sufficiency of the "pleading."

Our thought regarding the subject of pleading is best expressed by the following quotation from an article authored by James A. Pike of Washington, D. C., and John W. Willis of Los Angeles, California, which appears in 38 Columbia Law Review, 1179, as follows:

"The new Federal Rules of Civil Procedure do not proceed upon the assumption that the function of pleading is to prepare the case for trial. It is recognized that the 'issue-pleading' of the common law does not sift out the real issues, the 'fact-pleading' of the codes the real facts. *The generality of allegation contemplated by the Rules indicates the influence of the newer concept of 'notice pleading'*: the object of the complaint is to indicate to the defendant which grievance is being pressed; the object of the answer is to indicate to the plaintiff which defenses are being relied upon. What have been thought to be the objects of pleading—the narrowing of the issues, the revelation of facts—will be served by several devices more precisely adapted to their fulfillment: The familiar motions for certainty, the new pre-trial hearing, and the not new but completely renovated procedure for depositions and discovery."

In the case of *Securities & Exchange Commission v. Timetrust, Inc., et al.*, 28 Fed. Supp. 34, the plaintiff Commission sought to enjoin the defendants from using the mails in violation of the Anti-Fraud provisions of the Securities Act of 1933 as amended, charging, among other things, that defendants Bank of America, A. P. Giannini, L. Mario Giannini and John M. Grant were aiding, abetting and participating in such violations.

The complaint was held sufficient as against motions to dismiss, for a more definite statement or bill of particulars, and to strike alleged redundant and immaterial matters.

It is alleged that "Timetrust" was formed to aid in the sale of Bank of America stock, that the defendants in the sale of such stock, by use of the mails, employed a scheme to defraud the purchasers and sets forth the mechanics for the operation of a plan in furtherance of such scheme. The defendants, A. P. Giannini, L. Mario Giannini, John M. Grant and the Bank of America by its motions claim the complaint defective with respect to its allegations of their "aiding and abetting" the actions of the defendant Timetrust. As the motions in that case present substantially the same points relied upon by the appellees in the present action, and mentioned in the court's "conclusions," we deem it useful to here set forth the language of the complaint which was there under attack (Opinion p. 43):

"Timetrust, Incorporated, was organized * * *, and has been and still is being operated * * * with the active support and assistance of defendants A. P. Giannini, L. Mario Giannini, John M. Grant, and Bank of America National Trust & Savings Association;" that the "defendants Timetrust, Incorporated, Meredith Parker, Ralph

W. Wood and H. E. Blanchett, *aided and abetted* by the defendants A. P. Giannini, L. Mario Giannini, John M. Grant and Bank of America National Trust & Savings Association, have, since on or about August 11, 1938, in the sale of securities, viz., Timetrust certificates and common stock of Bank of America National Trust & Savings Association, *by the use of the mails, employed and are now employing a device, scheme and artifice to defraud the purchasers of such securities;*" and that "from August 11, 1938, Timetrust, Incorporated, and its officers, directors, agents, and sales personnel *at the aid and abetment of defendants* A. P. Giannini, L. Mario Giannini, John M. Grant and Bank of America National Trust & Savings Association, *in the sale of securities, namely, said Timetrust certificates and said common stock of Bank of America National Trust & Savings Association, by the use of the mails directly and indirectly, obtained and are now obtaining money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading.*"

The court in holding such language sufficient, states as follows (Opinion pp. 41 and 42):

"The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice, is all that is required. Pleadings shall be so construed as to do substantial justice * * *

At a meeting in Cleveland, Mr. Charles E. Clark, Dean of the Law School of Yale University and a

member of the Advisory Committee, led the discussion upon pleadings and motions. Mr. Clark stated that he heard from a lawyer who criticized this portion of the Rules. The lawyer said, 'Why a sixteen-year-old boy could plead under these rules!' 'Well, I would say, in answer,' observed Mr. Clark, 'why not, if he tells the court what his case is about?' And that is what we are trying to ask the lawyers to do, and to do it quite simply. It is in this liberal spirit of the new rules that defendant's criticism of the complaint will be considered. * * *."

The court further states in denying defendant's motion for a more definite statement or bill of particulars, as follows (Opinion p. 44):

"Because of the liberal view taken by the court in holding the complaint sufficient, it is unnecessary to give serious consideration to defendant's motion to strike. Perfection in pleading is rare. There may be allegations in the complaint which might have been more briefly and clearly stated and some sentences which might properly have been left out, but this kind of criticism could be urged in all cases. Prolixity is a besetting sin of most pleaders. *Courts should deal with the substance, and not the form of the language of the pleadings.* Where no harm will result from immaterial matter not affecting the substance, court's should hesitate to disturb a pleading. Another consideration in such circumstances, is that to grant the motion would delay bringing the case to a speedy trial."

Note:

A final judgment based upon the same complaint to which the defendants unsuccessfully objected in the above case, was later rendered by the District Court, wherein the injunction sought by the Securities & Exchange Commission was granted (39 Fed. Supp. 45) and from which an appeal was taken and is now pending in this court. (No. 9823.)

The decision of Judge St. Sure in the Timetrust case last above discussed is obviously an adaptation of the new mode of "notice-pleading" and is cited with approval by the Circuit Court of Appeals (3rd Cir.) in *Continental Collieries, Inc. v. Shober*, 130 Fed. (2d) 631, wherein the District Court's order granting a motion to dismiss was reversed.

While the facts involved in the latter case are not comparable with the ones in the present case, yet the principle or doctrine to be applied to a pleading is identical and is there stated in the following language (Op. p. 635):

"Under the Federal Rules of Civil Procedure, the function of the complaint is to afford *fair notice* to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved. * * * Under Rule 8 (a) (2) of the Federal Rules a plaintiff 'sets forth a claim for relief, when he makes 'a short and plain statement of the claim showing that the pleader is entitled to relief. * * * Technicalities are no longer of their former importance and a short statement which *fairly gives notice* of the nature of the claim is a sufficient compliance with the requirements of the rules."

The decision in this case also determines the *functions* of a "motion to dismiss for failure to state a claim" and the *limitations thereof*, which are in the present action directly involved. (Opinion p. 635):

"While most defenses are to be pleaded affirmatively under the Federal Rules, Rule 12 (b) (6) provides that the defense may take the form of a motion to dismiss for 'failure to state a claim upon which relief can be granted.' As observed in *Leimer v. State Mutual Life Assur. Co.*, 8 Cir., 108 F. (2d) 302, 305, 306, such a motion, of course, serves a useful purpose where, for instance, a complaint states a claim based upon a wrong for which there is *clearly no remedy*, or a claim which the plaintiff is *without right or power to assert* and for which no relief could possibly be granted to him, or a claim which the averments of the complaint show *conclusively* to be barred by limitations. However, the court in the *Leimer* case went on to admonish that there is no justification for dismissing a complaint for insufficiency of statement, *except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim.* * * * No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, *to an opportunity to try to prove it.*"

The case of *DeLoach et al. v. Crowleys, Inc.*, 128 Fed. (2d) 378, is an action under the Fair Labor Standards Act for wages and overtime. A motion to dismiss was granted by the District Court upon the ground that the petition did not show that plaintiffs were employed in commerce or in the production of goods for commerce,

and if they were shown, it appears that plaintiffs were excepted from the wage and overtime provisions of the Act.

The court states in its decision (Op. p. 379), that the allegations of the petition are not simple and direct as intended by the Rules of Civil Procedure, not so clear as would be desirable, and (Op. p. 380) that it could not be certainly told from the petition whether the plaintiffs as truck drivers come within the exception to the Act relating to overtime provisions.

In reversing the judgment of the District Court and determining that it was error to dismiss the petition on motion, the court states (Op. p. 380) :

“Under the Rules of Civil Procedure a case consists not in the pleadings but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings. Demurrers are abolished. A petition may be dismissed on motion if *clearly* without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some facts which will necessarily defeat the claim. *But the principle is no longer in force that pleadings will be construed strictly against the pleader.* Rule 8 (f) says that, ‘All pleadings shall be so construed as to do substantial justice.’ Just what this means is not clear but it excludes requiring technical exactness, *or the making of refined inferences against the pleader, and requires an effort to understand what he attempts to set forth.* Expensive trial of meritless

claims are sought to be avoided in the matter by pre-trial and summary judgment procedures. We think this petition should not therefore be dismissed on motion."

In *Fleming v. Dierkes Lumber & Coal Co.*, 39 Fed. Supp. 237, which is an action to enjoin the defendant from violating the Fair Labor Standards Act, the District Court, in denying in part and granting in part the defendants' motion for a more definite statement or bill of particulars, refers to the case of *Louisiana Farmers Protective Union, Inc. v. Great Atlantic & Pacific Tea Company of America, Inc.*, 31 Fed. Supp. 483, as sustaining certain well-established principles which relate to the consideration of pleadings which are attacked by motions and groups the same as follows (Op. pp. 239, 240):

"(1) The granting or refusal of a motion for a bill of particulars rests in the sound discretion of the court.

(2) Matters of evidence which a party will presumably introduce as establishing his case shall not be elicited or required by a motion for a bill of particulars.

(3) Ordinarily a bill of particulars will not be ordered as to *matters that are peculiarly within the knowledge of the moving party.*

(4) The scope of a bill of particulars should ordinarily be limited to such matters as are required to enable the moving party *to prepare his responsive pleading and generally to prepare for trial.* Rule 8 (a) (2) provides that the plaintiff shall make 'a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled.'

In Moore's Federal Procedure, Volume 1, page 553, it is said: 'what constituted good craftsmanship in pleading before the rules will continue to constitute good craftsmanship, but in ruling on the sufficiency of a pleading that is on the borderline, the court should consider:

(1) At what stage of the action is the objection raised?

(2) Are the *prima facie* elements of the claim or defense stated?

(3) *If these are stated, is the statement fair notice to the adverse party?*

(4) Is it feasible to require more particularity?

The court should not feel bound by restrictive decisions to what constitutes facts, evidence or conclusions of law.' "

It now seems well established that, *even upon a motion for a more definite statement or a bill of particulars*, matters which should be more peculiarly within the knowledge of the moving party than that of his adversary will not ordinarily be required and that the scope of a bill of particulars, if required, should be limited to such matters as are necessary to enable the moving party *to prepare his responsive pleading and generally prepare for trial.*

The decisions, in the above respect, should be especially applicable to a "shareholder's derivative suit" and particularly where the wrongful acts caused by the moving parties, are concealed from the shareholders, as in the present case.

To further illustrate the error of the District Court in granting the motions to dismiss and entering judgment thereon, we respectfully request the court to apply to the "pleading" the principles announced in the following decisions.

The District Court for the Northern District of Illinois, Eastern Division, in *United States v. Johns-Manville*, 1 F. R. D. 548, states the purpose of and comments upon, Rule 8(a) of the Rules of Civil Procedure as follows (Opinion p. 550):

"It is true that it has been said many times by courts that pleadings should contain statements of fact and not the conclusions of the pleader. It has also been said that the pleader should set forth ultimate facts and not evidence, *but where the line may be drawn between an 'ultimate' fact and a 'conclusion of the pleader' is something the courts have never been able to say.* The object of the pleading is to give the opposite party *notice of the claim* that will be made against him or the defense that will be interposed. Rule 8(a) of the Rules of Civil Procedure, 28 U. S. C. A., following Sec. 723(c), provides that the complaint shall contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Forms are next to the Rules, among them forms of complaint that are undoubtedly intended to illustrate the manner in which the charge of the plaintiff should be set out. *In those forms provision is not made for setting out in detail the acts complained of but merely what counsel for defense would undoubtedly call 'mere conclusions of the pleader.'*"

Again, in *C. F. Simonin's Sons, Inc. v. American Can Company*, the District Court for the Eastern District of Pennsylvania, 30 F. Supp. 901, at pages 902 and 903, considers the new rules of pleading as follows:

"Under the new rules, 28 U. S. C. A., following Sec. 723c, it is no longer proper to state evidentiary facts in the complaint. Rule 8(a) prescribes merely a short and plain statement of the claim, showing that the plaintiff is entitled to relief; Rule 8(e) (1) that each averment of a pleading shall be simple, concise, and direct; and Rule 12(b) (6) that the sufficiency of the complaint may be raised by a motion based upon 'failure to state a claim upon which relief can be granted.' *In all these provisions the word 'facts' is rather conspicuously absent, and there can be very little doubt, whatever the prior practice may have been, there is no longer any necessity to state such facts as have been described as 'evidentiary' as distinguished from 'ultimate', nor is it good practice.*"

In the case of *Van Dyke v. Broadhurst*, 28 F. Supp. 737, the sufficiency of a pleading, under the Rules of Civil Procedure, was considered upon the plaintiff's motion to require the defendant to set forth certain particulars in his counter-claim.

The court, in denying the motion, comments as follows (Opinion p. 740):

"This court has had occasion to state in former opinions its position with regard to the sufficiency of pleadings. Under the present liberal construction of the Rules of Civil Procedure, to avoid dismissal for failure to state a claim upon which relief may be had, *it is necessary only to allege sufficient facts*

to apprise the opposing party of the nature of the claim which will be proved. Technicalities in pleading are no longer observed. One of the principal reasons for this liberal construction is that the Rules of Civil Procedure provide ample means of discovery and methods of compelling the pleader to disclose to the fullest extent the facts upon which he bases his cause of action."

In *MacLeod v. Cohen-Ehrichs Corporation*, 28 F. Supp. 103, the defendant claimed that the plaintiff's complaint failed to state a cause of action on account of being based upon conclusions rather than facts. In considering this question the court states (Opinion p. 105):

"The requirements of a pleading are substantially set forth in Rules 8(a) and (1-3); (e) (1, 2), and 9(b), Federal Rules of Civil Procedure.

"Equity Rule 25, 28 U. S. C. A. following Section 723, required: 'a short and simple statement of the ultimate facts upon which plaintiff asks relief, omitting any mere statement of evidence.'

"In speaking of the change effected by the new rules, Moore says in his *Federal Practice*, Vol. 1, page 553, '*The Federal Courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence, or law.*'

"Judged by these standards, the complaint appears to be sufficiently definite to give fair notice to the defendant. . . ."

In *Pearson v. Hershey Creamery Company*, 30 F. Supp. 82, the defendants moved for a more definite statement or a bill of particulars.

As the objections to the pleading, in the above case, are similar in principle, and in other respects to the grounds announced by the District Court in granting the motions to dismiss in the case at bar, we take the liberty of setting forth the entire opinion of the court.

“The complaint alleges the formation of a contract between the Plaintiff and Defendant whereby the Plaintiff was to make an audit and survey of the Defendant’s stores and plants. The Plaintiff was authorized to obtain refunds of overpayments made by Defendant to Utility companies. As compensation for these services, the Plaintiff was to receive one-half of all refunds obtained and one-half of all savings effected by Plaintiff’s survey and audit for a period of three years from the dates of the new billings. The plaintiff alleged that he had secured certain refunds and that savings in stated amounts had been effected by virtue of the audit and survey. This action was brought to recover one-half of these refunds and savings. *The Defendant requests, in its motion, that the Plaintiff file a more definite statement or bill of particulars containing the names of the officers of the Defendant to whom the Plaintiff made his recommendations, the specific recommendations made, the approximate date the recommendations were made; whether the recommendations were written or oral, whether they were adopted by the Defendant, the effect of the adoption of the recommendations on Defendant’s utility bills and the utility companies involved, and the method or manner in which the Plaintiff computed the savings he had effected.*

“There are certain additional requests addressed to particular allegations in the complaint but not common to all and not listed here. The Plaintiff’s survey and audit covered more than two hundred stores and plants of the Defendant. It is clear, therefore, that if the Plaintiff complied with Defendant’s motion, the complaint would consist of several hundred pages of detailed allegations. *Such a pleading is not contemplated by the rules of civil procedure, which require that the complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief.* E. I. Du Pont De Nemours & Co. v. Dupont Textile Mills, Inc., D. C., 26 F. Supp. 236. Motions filed under Rule 12(e), Rules of Civil Procedure, 28 U. S. C. A. following section 723c, will be granted only where their object is to amplify pleadings which are so insufficient that either an answer cannot be prepared in response thereto or the Defendant cannot prepare for trial. If these conditions do not exist, the motion will be refused *regardless of the rules and decisions relating to similar motions under the practice existing prior to the present rules of civil procedure.* Bills of particulars or more definite statements are no longer necessary to prevent surprise at the trial nor are they necessary to limit or define the issues. The methods for discovery available to parties under the present rules place the pleader’s information almost entirely within the control of opposing parties. Surprise at the trial has now become almost impossible where careful use is made of Rules 35 to 37. Furthermore, the pre-trial conferences, which are still in their infancy, have met with considerable success in this Court and it is confidently expected that these conferences will reduce the issues at trial to their barest minimum.

"The complaint in the present case is sufficiently definite for the purpose of framing an answer. It is also sufficiently definite to enable the Defendant to prepare, in a general way, for trial. Therefore, the motion must be denied."

Comment.

The conclusion of the District Court contained in Point I directed to Paragraphs XXVI to XXIX, inclusive, of the "pleading" [Tr. pp. 163 to 169] concerning the "Bancitaly Corporation" transaction, are followed by certain observations of the court, which in our opinion are not justified and do not constitute a proper ground for a dismissal of the action. The remarks of the court are as follows [Tr. pp. 337, 338]:

"What, if anything, the defendants, other than the three last above named, or any of these forty-four other persons had to do with the making of said salary agreement, in what particulars the acts of those defendants and the forty-four other persons who were directors of Transamerica at the time the latter assumed liability under said salary agreement constituted fraud or other wrongful conduct, whether plaintiff claims that all of the defendants and all of said forty-four other persons knew about the credit entries made between April 5, 1929 and the end of that year in favor of defendants A. P. Giannini, L. M. Giannini and V. D. Giannini (now deceased), were false and fraudulent or fictitious, or whether plaintiff seeks to charge that because some of the defendants and other persons possessed such knowledge, particularly those who knew of these book entries or at least attended meetings of the board of directors of Transamerica during the period last mentioned, therefore all of

the defendants and all of said forty-four persons *may be charged as a matter of law with having caused such entries to be made upon the books of said corporation, its subsidiaries, etc., the complaint fails to disclose. Instead, much is left to conjecture.*

“The foregoing series of alleged wrongs may be described as having stemmed from or as being in some way connected with the alleged fraudulent salary agreement. It will also be observed that many alleged wrongful acts are charged in language rather general though sweeping in character.

“Likewise it is claimed that these alleged wrongs were perpetrated over a period comprising many years, during which not only one or another of several different boards, of directors of Transamerica presumptively controlled the management of that corporation *but in addition what might be termed to primary wrong in this particular series appears to have been committed by the management of a different and earlier corporation, with which virtually all but very few of the defendants had nothing to do.*”

If one were to assume that the foregoing remarks of the District Court were sufficient to justify the granting of “motions to dismiss,” the fact remains that the “pleading” and the new rules clearly answer all of the court’s observations. The story in this respect, as told by the “pleading,” is a simple one. It is not claimed that any of the appellees, other than Amadeo P. Giannini, P. C. Hale, James A. Bacigalupi, L. M. Giannini and Virgil D. Giannini (now deceased) had anything to do with the *original making* of the “salary agreement.” The wrong of *all* appellees was in causing the “defendant

corporation” to *assume* the pretended obligations thereof. Such act constitutes one of the “particulars” of the fraud as the “salary agreement” and the “credit entries” were by them, known to have been used for the purpose of making private gain by computing the amount due, according to the terms of the contract, *upon false, fictitious, unearned and unrealized profits and entering the amounts as “credit entries.”*

After such “salary agreement” and “credit entries” had been so set up on the books of “Bancitaly Corporation” all the appellees caused the defendant corporation to *assume such obligations*, knowing that the contract had been so used, and thereafter *continued to use* the same as an instrument to pluck the funds of the “defendant corporation” and did thereafter, at various times, *compute* the net earnings of the “defendant corporation” upon false, fictitious, unearned and unrealized profits, *pass the items* thereof to the books of the “defendant corporation” as additional “credit entries” and from time to time *disbursed* the same to some of the conspiring appellees.

It occurs to us that this clearly announces the particular acts constituting the wrong or fraud with which the appellees are charged. The “pleading” alleges that *all the appellees* committed such acts. This charge, whether it be established upon the trial as a matter of law or one of fact, remains, for the purpose of the motions to dismiss, *a present established fact.*

In other words, some of the “conspiring appellees” originated and used the “salary agreement” to obtain the funds of the “Bancitaly corporation” by computing its net earnings upon false, unearned and unrealized profits and by passing the items thereof to its books of account

as "credit entries" and thereafter *all of the conspiring appellees knowingly* caused the "defendant corporation" to assume such "salary agreement" and "credit entries" and continued the same "scheme of operation" against the funds of the "defendant corporation."

The "pleading" informs the appellees that when they caused the defendant corporation to assume the "salary agreement" and the "credit entries" of the Bancitaly corporation they all knew of its prior fraudulent use in the manner stated. Whether their knowledge was actual or implied *is not a matter of pleading.*

In further replying to the court's observations, we deem it proper to point out that directors and officers of a corporation may also be "conspirators" and if so, *they are liable in the same sense and to the same extent as other conspiring individuals* and remain so until a legal and sufficient withdrawal from the conspiracy is established. *This does not appear upon the face of the "pleading."*

The "conclusion" of the District Court contained in Point III, also concerning the form of the language used [Tr. p. 353], and appears to be directed to the pleading as a whole. It gives no guide whatsoever as to its application as a ground for granting appellees' motions to dismiss.

In erroneously imposing "uncertainty" and "indefiniteness" to the language of the "pleading" the court in referring to the "Bankitaly Mortgage Company—Pacific Coast Mortgage Company transactions" contained in

Paragraphs XXXIV to XXXVI of the pleading [Tr. pp. 173 to 177, inclusive], states as follows [Tr. p. 341]:

“Here it should be pointed out that the allegations embraced within paragraphs XXXIV to XXXVI are so phrased as to leave uncertain whether plaintiff claims that the total of all the advances made from the funds of Transamerica with respect to the so-called Pacific Coast Mortgage Company dealings amounted to the sum of \$1,500,000 or the sum of \$3,000,000.”

A mere reading of said Paragraph XXXV discloses that \$1,500,000 of the funds of the “defendant corporation” *were used to acquire the controlling interest in the capital stock of the “Bankitaly Mortgage Company” and an additional \$1,500,000 of defendant corporation’s funds was transferred to the treasury of the “Bankitaly Mortgage Company” to be used as capital.* We submit that the court’s remarks are unjustified.

In referring to Paragraph XXXVII and XXXVIII of the “pleading” relating to the stock speculations through the Smith-Mallory trust syndicate and the secret profits derived therefrom, the District Court likewise announced its conclusion as follows [Tr. p. 342]:

“Here likewise the pleading is indefinite, that is, it is not clear whether plaintiff contends that the aforementioned profits were divided among the particular three or four persons who are repeatedly singled out in the complaint or that such profits were distributed among all of the defendants and all said forty-four other persons.”

Here again a mere reading of said Paragraph XXXVIII [Tr. p. 180] of the "pleading" clearly indicates that the trust syndicate disbursed the \$300,000 in secret profits *to all the conspirators*. They are mentioned as the "defendants and persons."

The District Court in support of its "conclusion" that the appellant's pleading did not allege fraud with sufficient particularity, made the following remarkable observation, to-wit [Tr. pp. 345 to 347]:

"A pleading must be construed most strongly against the pleader. The presumption is that the latter has stated his cause as strongly as the facts warrant. In view of plaintiff's admission to the effect that at all times since April 27, 1939, she had continued diligently to investigate to ascertain the truth concerning the conduct of the defendants and the other directors with respect to their management and operation of the business of Transamerica, and that although she had been so engaged for a period of approximately two and a half years, nevertheless, she had been unable to complete such investigation and was still carrying on the same at the time of filing her last amended complaint, there arises at least the inference that when she does conclude such inquiry plaintiff may discover one or more of her charges to be unsupported by the facts.

The accusations made herein are of a most serious nature. The period of time involved extends over a great many years. The good name of an exceedingly large number of individuals is under attack. Prior

to the filing of the present suit two of the allegedly chief conspirators had died. Their legal representatives are included among the eighty-one defendants. Since the filing of the second amended complaint one of the defendants also has died. So far as the pleading discloses only four of the present defendants are residents of this district. Where the remaining individual defendants reside, or *from what distances they may be required to travel in order to attend the trial of this cause*, does not appear, except that they reside in California. The principal office and place of business of Transamerica are alleged to be in the City and County of San Francisco, namely, in the Northern District of this State. For aught that now appears the meetings of its directors have taken place in the latter district. *Doubtless many corporate records, more or less voluminous, will need to be transported from the corporation's principal office for the purpose of the trial.* The plaintiff herself claims to be a resident of the State of New York. *Just why this litigation should have been filed in this District is not clear.*

Under these circumstances before the defendants are subjected to the burdens, financial and otherwise, which a trial of the charges aforementioned would impose, they are entitled to be apprised with reasonable definiteness, both as to what it is claimed was their specific participation in the acts complained of, also wherein it is asserted their particular conduct constituted a violation of plaintiff's rights. In any event, plaintiff's admission as above stated to the

effect that she is still endeavoring to ascertain the truth of the charges she has made herein furnishes *a most convincing ground for applying strongly against the pleader* the rule that in all averments of fraud the circumstances constituting the fraud shall be stated with particularity.”

As we understand the present rule a pleading is no longer construed most strongly against the pleader. He is not “parsed” out of court by adverse presumptions and inferences.

DeLoach v. Crowley's, 128 F. (2d) 378, 380.

The period of time involved does not extend over a great many years when compared with the magnitude of the wrong and the sacredness of the violated trust.

The court’s reason for assuming the good name of the appellees or any of the them, upon the hearing of the motion, is to us, most unusual and difficult to understand. It appears to be directed to the *merits of the case upon a trial* where the issue of “purpose and intent” of the appellees has been considered. Just why the court, in passing upon these motions to dismiss, is solicitous regarding the distance which the appellees or some of them may be obliged to travel to attend the trial, leaves us somewhat confused; as does the court’s apprehension that it will be necessary to transport voluminous corporate records from the corporation’s principal office to the place of trial. We are likewise unable to reply to the court’s criticism of the action being filed and prosecuted in this district, nor are

we able to understand the *astounding statement* that the appellees are entitled to a more definite statement because a trial will subject them to financial and other burdens. It would seem to us that the pleading should be construed as to do substantial justice (Subdivision F, Rule 8, FRCP), and in doing that, especially upon a hearing involving questions of law only, the financial and other burdens of the litigation are irrelevant.

We also direct attention to that part of the District Court's criticism of the "pleading" where, after mentioning the appellant's allegations concerning her "continuing investigation" to ascertain the facts, the District Court states: [Tr. p. 345]

"there arises at least the inference that when she does conclude such inquiry plaintiff may discover one or more of her charges to be unsupported by the facts."

With respect to this ~~fact~~ announcement, we direct the court's attention to the fact that it can be reasonably assumed, *from the investigation*, made by the appellant *after* discovering the Securities & Exchange Commission proceeding, which aroused her suspicion regarding the management of the affairs of the "defendant corporation," and up to and including the filing of her "pleading," *she discovered the very facts and circumstances related in the "pleading."*

We submit that the pleading should be construed to do substantial justice and not interpreted by unwarranted presumptions or inferences against the appellant.

Nowhere does the court in any manner refer to the new concept of pleading; nor to the decisions which interpret and illustrate the same. It is not indicated that the pleading is insufficient to notify the appellees of the "grievance" with which they are charged, nor wherein they are unable to frame a responsive pleading. The conclusions and remarks of the court, used as a basis for granting the "motion to dismiss," urge upon us a conviction that the court did not consider the appellant's "claim" in its true sense, but on the other hand has destroyed it by mere legalistic construction.

The language of appellant's pleading is indeed plain, simple, clear and concise. It may contain some repetition and some surplusage but there is not a sentence nor a paragraph within its scope that appellees may, without hazard admit, deny, explain or modify. We have made an exceptional effort to comply with the present rules of pleading believing they mean just what they say.

PART TWO.

Relating to Point II [Tr. 492], Specifications (a) to (d) (Br. pp. 36-37), Point IV [Tr. 493], Specifications (a) to (c) (Br. pp. 38-39), Point V [Tr. 493], Specifications (b), (e) and (f) (Br. pp. 39-40), Point VI [Tr. 493, 494], Specifications (b), (e) and (f) (Br. p. 41), Point VII [Tr. 494], Specifications (b), (e) and (f) (Br. p. 42).

Note:

1. The foregoing "specifications," made under the points above designated, each refer to the error of the District Court in applying, from the face of the "pleading," the Statute of Limitations and the doctrine of laches as a bar to the prosecution of appellant's action. We have therefore grouped the same for the purpose of discussion.

2. We present our views in light of the new rules of pleading, namely, Subdivision (c) of Rule 8 and Subdivision (b) of Rule 12 and direct attention to the decisions, both before and after the effective date thereof.

Michoud v. Girod, 45 U. S. 502, is a case of *actual* fraud committed by trustees of real estate. A bill filed *thirty-six years* after the commission of the fraud was held not to have been too late. In this case, a purchase by an executor through a third person of the property of the testator was held to be fraudulent and void. The sale was a public auction judicially ordered and the result of the evidence was that a fair price was paid.

Mr. Justice Wayne, in delivering the opinion of the court (p. 560):

“In a case of *actual* fraud, courts of equity give relief after a long lapse of time, much longer than has passed since the executors, in this instance, purchased their testator’s estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief . . . *there is no rule in equity which excludes the consideration of circumstances*, and, in a case of *actual* fraud, we believe no case can be found in the books, in which a court of equity has refused to give relief within the life time of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered, or becomes known to the party whose rights are affected by it.”

In considering the plea of laches in the foregoing case, the court first ascertained, *from all of the circumstances of the case, the situation with which the plaintiffs were confronted* and as a predicate for its announcement of the law as above set forth, states (Opinion pp. 559, 560):

“Nor do we think that the complainants have lost their rights by negligence, or by the lapse of time. We can only see in their conduct the fears and forbearance of dependent relatives, far distant from the scene of the transaction of which they complain, desirous of having what was due to them, and suspecting it had been withheld, but unwilling to believe that they had been wronged by brothers, with whom they had been associated in a common interest by another brother who was dead.”

In the case of *McIntire v. Pryor*, 173 U. S. 38, the bill was filed *nine years and four months* after the commission of the fraud and the court in determining the issue of laches on the allegations and proof states (Opinion pp. 53, 54):

“The bill was filed October 21, 1899, a delay of nine years and four months. Upon the theory of the plaintiff, however,—*and it is upon her allegations and proofs* that the question of laches must be determined, * * * we have a right to consider in this connection that the plaintiff is an ignorant colored woman; that she has been wheedled out of her property by an *audacious* fraud, committed by one in whom she placed *entire confidence* and who assumed to act as her agent, that this agent procured the title to the property to be taken in his own interest for little more than a nominal sum by the false personation of Emma Taylor; that the property is still controlled and probably owned by himself; that the position of the property and of the parties to this suit has not materially changed during the time the plaintiff has been in default, nor the property shown to have been rapidly risen in value, and that the rights of no *bona fide* purchaser have intervened.”

and at the conclusion of the opinion (p. 59), further states:

“The *circumstances* of this case are so peculiar; *the fraud so glaring*; the original and persistent intention of McIntire through so many years to make himself the owner of the property, so manifest; *the utter disregard* shown of the rights of the plaintiff, as well as of Jenison, the mortgagee, upon whose

ignorance in the one case and whose confidence in the other he imposed so successfully; the false personation of Emma Taylor, *and the fact that the decree in favor of the plaintiff can do no possible harm to an innocent person*, demand of us an affirmance of the action of the court of appeals. Its decree is accordingly."

The case of *Baker, et al. v. Scofield*, 221 Fed. 322 [9 Cir.], is a suit by the receiver of a national bank to recover real estate fraudulently transferred by a former receiver to a secret trust for himself. At the time the suit was instituted the former receiver was still the owner of the property and had been for four years, but the title had never been in his name *and his connection with it had been concealed*. The doctrine of this case is based upon *Michaud v. Girod, infra*, 45 U. S. 502, and has never been questioned, altered or modified. We quote liberally therefrom with respect to that portion of the opinion where the defendants' plea of laches is denied, as follows (Opinion p. 334):

"In answer to the contention of the defendants that the present suit is barred by laches, little need be said. We have searched the record in vain for *testimony*, even of the slightest, tending in the remotest degree to show either actual knowledge, or any channel leading to knowledge, on the part of the plaintiff, or his predecessors in office, or the Comptroller of the Currency of the United States, respecting the purchase by Baker of the contract covering the tidelands during the term of his receivership. During Baker's *fourteen years* ownership of this

property never once has it appeared in his name. Although Baker himself testified that, when he negotiated with Simpson for the transfer of the legal title to the contract of purchase, to himself, all outstanding claims against him had been satisfied and he was practically out of debt, nevertheless the title to the contract was placed in the name of Norton, his New York attorney, where it remained until the organization of the Seattle Water Front Realty Company. Although the owner of practically all of the stock of that company from the date of its organization down to the present time, Baker has never appeared in any of its activities as an officer thereof, or in any other capacity. *Every avenue by which the transactions affecting the transfer of real property generally become known in the business world has been guardedly closed; every act tending to show the relationship of Baker to the tidelands has been zealously guarded.*

In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, ought not to exclude relief.' * * * Still, within what time a constructive trust will be barred must depend *upon the circumstances of the case.*"

Note:

The substantial facts with respect to concealment which existed in the above case are parallel with the fraudulent concealment in the present action, and the principles and doctrine applied by the court are likewise applicable. There has never been any change in the basic law with respect to fraudulent concealment.

In the case of *Felix v. Patrick*, 145 U. S. 317, where a bill was filed, after a lapse of *twenty-eight years*, to impeach a title fraudulently acquired, the court in limiting the relief granted the plaintiff states (Opinion p. 334):

“The law pronounces the transaction a fraud upon her, but it lacks the element of wickedness necessary to constitute moral turpitude. *If there had been a deliberate attempt on his part by knavish practices to beguile or wheedle her out of these lands, we should have been strongly inclined to afford the plaintiffs relief at any time during the life of either of the parties*; but, as the case stands at present, justice requires only what the law, in the absence of the statutory limitations would demand—the repayment of the value of the scrip with legal interest thereon.”

Note:

In the foregoing case the court makes it clear that the *nature and character* of the fraud practiced and the *degree of wickedness* involved on the part of the defendants is one of the governing elements in determining an issue of laches. It is obvious that in the present action such a question cannot be ascertained without resort to trial upon the merits.

It is an established rule of equity as administered in the courts of the United States that where relief is asked on the ground of *actual* fraud especially if such fraud has been *concealed*, time will not run in favor of the defendant until the discovery of the fraud or until, with reasonable diligence it might have been discovered. *Lopez v. Geantier*, 41 Fed. (2d) 914, 916 [1 Cir.]

Note:

The above action is a suit for an accounting by a guardian for alleged breach of trust and fraud. The defendant claimed that the action was barred by a four year statute of limitations but the court held that such statute of limitations was not applicable to a case of *concealed fraud*. The decision in such respect is based upon *McIntire v. Pryor* and *Michaud v. Girod, supra*.

The case of *Richardson Brothers v. Blue Grass Mining Company, et al.*, 29 Fed. Supp. 658, is a derivative shareholders' suit to enforce corporate rights and recover corporate assets from individual defendants because of alleged misconduct and breaches of trust. In denying the defendants' plea of laches, the court states (Opinion pp. 665, 666):

"Mere lapse of time, however, is not the only element to be considered in applying the rule. *A more important consideration is whether delay in asserting the claim has worked such prejudice or disadvantage to parties adversely interested or such changed conditions which occurred in the meantime that enforcement of the claim is rendered inequitable.* There is no fixed rule by which to measure the degree of laches which is sufficient to bar the enforcement of a right. *Each case must be determined according to its own particular facts and circumstances.* * * * Where the parties sustained a confidential relation to each other, and the claim arises from an alleged breach of trust, or fraud is imputed, in the interest of justice *a court of equity will look upon delay with much more indulgence.* * * * It is sufficient to

say that in the light of the facts disclosed by this record, it does not appear that complainants have been guilty of unreasonable delay or that defendants have suffered such prejudice or disadvantage on account thereof as to make enforcement of the demand inequitable. The defense of laches is without merit."

In *Terry, et al. v. Prairie Oil & Gas Company*, 83 Fed. (2d) 843 [5 Cir.], the action was instituted to recover the title and possession of land from certain defendants and to require the Prairie Oil & Gas Company to account for royalties under a lease upon such land which was executed *more than five years prior to the suit*. The Prairie Oil & Gas Company was not shown to have been guilty of any fraud in procuring its title, nor did it have any knowledge that the defendant from whom it procured title was not the true owner. Certain claims of the defendants with respect to their interest in the surface estate of the property were denied by the District Court as barred by laches. In reversing this part of the decision, the court states as follows (Opinion pp. 486, 487):

"It is fundamental that the plea of laches is not controlled by limitation or mere passage of time and always presents a question of fact. In this case, the finding of the District Court was that Thomas J. Terry and Samuel G. Terry 'have for a long time had such knowledge with reference to the subject matter involved and of the court proceedings had in this case as to be barred by laches from prosecuting his suit.' And that is all. It must be remembered that Diana Shaw was guilty of *actual* fraud in procuring the judgment relied upon to divest appellants of their title. * * * There is no

doubt that the title to $\frac{1}{2}$ of the land recovered by Diana Shaw by the judgment in suit No. 150 remained in appellants. In *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, at page 38, 21 S. Ct. 7, 14, 45 L. Ed. 60, it was said 'in cases of actual fraud, as we have repeatedly held * * * the plea of laches has but an imperfect application.' And again '*in a case of an active and continuing fraud like this, we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence.*' The findings of the District Court go no further than to hold that Thomas J. Terry and Samuel G. Terry had knowledge of the adverse claim of Diana Shaw *and cannot be extended by implication to a finding that they had consented or acquiesced therein*, the plea of laches is not sustained by the record."

The case of *Stanwood, et al. v. Wishard, et al.*, 134 Fed. 959, is a creditor's suit which charges a conspiracy against defendants with respect to certain real estate belonging to a corporation of which plaintiffs were creditors. It was alleged in the bill that the defendant Wishard was the attorney for the plaintiff and as such employed to collect a claim against a debtor corporation and that in doing so, he acquired title to certain property and held the same and received the rents thereof for *ten years prior to action*. In denying the defendants' claim of laches, the court in arriving at its conclusion states (Opinion pp. 963, 964):

"It does not appear from the lapse of time that the situation of the parties has changed. There is no reason for believing that the property has materially changed in value. From the bill the alleged

fraud is not in doubt. What could the plaintiffs have done at an earlier time? Must they all the time have suspected their attorney of fraud? Is that to be the rule? *They reposed confidence in him.* When did such confidence cease? Was it when they failed to get their money? Must a lawyer, when failing to get results, stand impeached for fraud? If so, then there is no lawyer of high or low station but must go over the dam. In the case at bar, *there is no innocent person to suffer by reason of delay.* The whole case stands precisely as it would have if this suit had been brought the day following the sheriff's deed. In *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, it was held that the fraud was known when it could, by the exercise of diligence, have been known. That was a Statute of Limitations case. But, assuming that the same would be the rule in a case of laches (which is not always so), what diligence could have been used by these plaintiffs? None whatever. Defendants' contention is, in effect, in asking a court to hold that a litigant must first suspect his lawyer of fraud. Then on such suspicion he must travel 1500 miles, and to go work to unearth the fraud of his own lawyer, and then bring his suit, *because of an actual fraud. No such requirements are exacted of anyone, and particularly is this not to be exacted of clients so far distant, some of whom quite likely are not familiar with business affairs.* In *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076, the Supreme Court held that 36 years was not too late to bring an action against an executor who bought in the assets of the estate with which he had been entrusted. And on more than one phase of this case as alleged in the bill—and that is the only case now before the court—what the Supreme Court

held in that case is nothing new, but is well worthy of keeping in mind. The Supreme Court said:

“ ‘The rule in equity is, in every court of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest or not, carries fraud on the face of it,’ and surely an executor is no more subject to the charge of fraud than is an attorney, who is told from the first day he enters law school or law office that he must not and shall not buy property the subject of real or possible litigation by his clients. The case of *McIntire v. Pryor*, 173 U. S. 38, 54, 19 Sup. Ct. 352, 43 L. Ed. 606, collects the cases that conclude all discussion that as against an *actual fraud*, and as against one *perpetrating fraud when acting in a representative and trusting capacity*, the period of the Statute of Limitations is largely if not wholly immaterial, and that a lawyer who buys in property on a paper transaction, paying but nominal sums, receiving such rentals as soon pay for it, when such property was subject to his client’s claims, *commits an actual fraud*, and one which no court will wink at, is too plain for debate. The amended bill charges such a fraud. The demurrer, for the time being admits them to be true and if not denied, or, if denied, but sustained by the proofs, there can be no other decree but one declaring that *Wishard holds the property in trust*. Defendants must answer the amended bill within the time allowed, by the rules, or elect to stand upon their demurrer.’ ”

Relating to the use of a "motion to dismiss" for the presentation of the defense of laches *and the limitation placed thereon*, we further direct the court's attention to the case of *Leimer v. State Mutual Life Assurance Co.* (8 Cir.), 108 Fed. (2d) 302 (Op. p. 305):

"So far as laches is concerned, it has been repeatedly held that mere lapse of time does not constitute laches. It is to be determined by consideration of justice, *and that is dependent upon the circumstances of each particular case.* * * * In order to determine whether the plaintiff's claim was barred by laches, we would have to know more than is disclosed by her amended complaint. *Long before the Rules of Civil Procedure for the District Courts of the United States became effective, this Court has frequently disapproved the practice of attempting to put an end to litigation, believed to be without merit, by dismissing a complaint for insufficiency of statement.* In *Winget v. Rockwood*, 8 Cir., 69 F. 2d, 326, 329, we said: 'a suit should not ordinarily be disposed of on such a motion (a motion to dismiss the bill for want of equity) unless it *clearly* appears from the allegations of the bill that it must ultimately, upon final hearing, be dismissed. *To warrant such dismissal, it should appear from the allegations that a cause of action does not exist, rather than a cause of action has been defectively stated* * * *. *That a rule of procedure should be followed which will be most likely to result in justice between the parties, and, generally speaking, that result is more likely to be attained by leaving the merits of the cause to be disposed of after answer and the submission of proof, than by attempting to deal with the merits on motion to dismiss the bill.*'"

As the substantive law of the State of Delaware is here controlling, with respect to the rights of the parties (*Erie Railroad Company v. Tompkins*, 304 U. S. 64), we refer to the following Delaware decisions concerning the application of the "Statute of Limitations" or the doctrine of "laches" against a shareholder of a corporation.

We cite the case of *Cahall, Receiver v. Lofland*, 12 Del. Chancery 290, at p. 305, which is *a bill for an accounting* to recover against former officers, directors and other monies and property due the corporation, where it is said:

"Throughout the consideration of this case, it must be borne in mind that the directors and officers of a corporation are stewards or *trustees for the stockholders*, and their acts are to be tested as such according to the searching, drastic and far reaching rules of conduct which experience has found to be salutary to protect trust beneficiaries"

and upon such premise the court further states with respect to the subject under discussion, as follows (Opinion p. 319):

"The stockholders have not acquiesced in or ratified any of the acts complained of *and have not been guilty of laches in seeking relief*. The only circumstances alleged to show knowledge by stockholders of the transactions complained of was that the books containing minutes of director's meetings and the accounts of the corporation were present at meetings of the stockholders, and the fact of the appointment by the stockholders of auditors. There was no testimony that audits were made. The presence of the books at the meetings did not justify any inference as to knowledge by the stockholders of their contents, and hence no implications of ratification can be justly as-

serted here. Stockholders have a right to expect the officers of the corporation to be faithful to their trust, *and a stockholder is not chargeable with knowledge merely because he might have ascertained facts by an examination of corporate books.* One cannot ratify that which he does not know. The burden is on him who relies on a ratification to show that it was made with a full knowledge of all material facts. Stockholders cannot be presumed to know facts appearing in the records and books of the corporation. Means of knowledge is not knowledge in such case. As was said in *Camden, etc. Co. v. Lewis*, 101 Me. 78, 102, 63 Atl. 523, 533: 'It is not to be expected, and it is not true generally, that the stockholders in meeting assembled, know what is contained in the records of directors meetings, or in the books of account.' "

The case of *Cahall, Receiver, v. Burbage*, 13 Del. Chancery 299, is also a bill for an accounting for the fraud of a director of a corporation where the fraudulent transaction was a matter of corporate record and with respect to which the court after holding that where there is no actual knowledge of a fraud, equity attributes no laches unless the lack of knowledge is attributable *to the culpable negligence of the defaulted party* and based upon such principle states (Opinion p. 303):

"The failure of stockholders to examine the corporate records and books and thus acquire the knowledge of the wrongful acts of the corporate officers and directors, is not to be attributed to their negligence and they have a right to assume that the officers and directors will be faithful to their trusts."

COMMENT.

From a careful study of the decisions of the Federal Courts, it clearly appears that where an issue of laches is interposed, except in very rare cases entirely foreign to the present action, the elements thereof which the court must *factually* ascertain are inseparable from the merits of the case. The precise extent to which Federal Courts are bound by state statutes of limitations in considering an issue of laches has never been definitely determined. Each of the foregoing statements is especially true in cases involving a "fraudulent concealment" of wrongs in an equitable suit for an accounting against a trustee or other fiduciary.

In the present action the nature and extent of the "fraudulent concealment," as alleged in paragraphs XXIX, XXXIII, XXXV, XXXVI, XXXVII, XL and XLI [Tr. 168, 169, 173, 176, 178, 179, 182, 183] of the "pleading," makes it obvious that such wrongs were beyond discovery by any ordinary person irrespective of any degree of diligence.

The District Court in its "conclusions" failed to comment upon the appellees' "fraudulent concealment" of their wrongful acts and no avenue is suggested through which appellant, by the exercise of reasonable or any degree of diligence, could have ascertained or uncovered such acts or obtained any information with respect thereto, prior to the actual discovery of the "proceeding" before the United States Securities and Exchange Commission.

As announced and considered in the cases heretofore mentioned, the only correct and just manner of determining the issue of "laches," is by a formal plea of the de-

fendants and a full and complete development, by evidence, of all the facts and circumstances of the case.

The elements of laches or the absence thereof call for such an investigation. Except in very rare cases where neglect or lack of diligence is *clearly* apparent upon the face of a complaint, such issue is factual. In the present action, appellant desires the appellees to face a trial upon the merits of the controversy that, among others, the issue of "laches" if properly and sufficiently presented, may be fairly tried and appellants' case not erased by academic interpretation upon "motions to dismiss."

In considering this subject as a whole, we deem it proper to point out that subdivision (c) of Rule 8 expressly provides that "laches" and the "Statute of Limitations" as a defense must affirmatively be set forth in a responsive pleading and subdivision (b) of Rule 12, provides that every defense in law or fact to a claim for relief, shall be asserted in a responsive pleading, except that certain defenses may, at the option of the pleader, be made by motion, but the defense of "laches" and the "*Statute of Limitations*" are each noticeably omitted.

In this regard we direct the Court's attention to the case of *Dirk Ter Haar v. Seaboard Oil Company of Delaware*, 1 F. R. D. 598, where it is stated (Op. p. 598):

"The defense of laches, stale demands and the statute of limitations may not be asserted by motion to dismiss, but should be set forth affirmatively in defendant's answer."

It seems well established that in the Federal courts the State Statutes of Limitations are applied by analogy as laches, *but only where the facts make it inequitable not to*

do so (*Webb v. American Surety Co.*, 88 Fed. Rep. (2d) 171, Op. 175) and that being true the mere lapse of time is only one of the elements to be considered in applying the doctrine. The most important consideration is whether the delay in asserting a claim has worked such disadvantage to parties adversely interested that enforcement of the claim is rendered inequitable. It is obvious from these principles that the defense of "laches" and the Statute of Limitations should only be determined from all the facts and circumstances developed upon a trial.

From the decisions it will also be seen that in cases of *gross actual fraud* the doctrine is not ordinarily applied, *except to protect the rights of innocent third persons* and that in a case of active and continuing fraud the degree of laches should be determined by the proof and to be effective must amount to an assent or acquiescence in the wrong by the plaintiff.

The present action involves the corporate acts of the "defendant corporation" in which the appellees caused them to engage which are preserved in written corporate records which cannot be altered by any of the parties to the action, their personal representatives or lapse of time. It is difficult for us to believe that the death of a wrongdoer who had committed a grievous and continuous wrong, without other accompanying equitable circumstances, is recognized in equity as such a disadvantage as to render the doctrine of laches applicable in an action for an accounting against his estate. Certainly more than this must appear to sustain a "conclusion" that the doctrine is applicable. In many cases, when all the facts are presented, the equities might be on the side of the plaintiff and show that it would be inequitable to apply the doctrine. We

seek the right to make such a showing on behalf of the appellant upon the trial of the present action.

In *Fleishhacker et al. v. Blum et al.*, 109 Fed. (2d) 543, this court decided that the action was not barred by the California Statute of Limitations.

The bank loans which were the basis of the wrong in that case were made on *December 19, 1919 and December 22, 1919*. The wrong involved therein was discovered by the shareholders, only through an independent investigation made, thirteen or fourteen years later. The action was filed on December 5th, 1934, fifteen years later.

In the present action the wrong is a continuing one, commencing on or about October 11, 1921 and continuing until at least August 21, 1942.

In the case at bar the plaintiff stockholders' first discovery of suspicious circumstances with respect to wrong doing by the corporate management was on the 27th day of April, 1939. Her action was filed April 16, 1941 and within the statutory period relating to the discovery of fraud.

In the *Fleishhacker* case, the District Court found that the plaintiff stockholder discovered the fraud within three years prior to the commencement of the action and not sooner. The court determined that the bank did not discover the fraud until the appellee shareholders brought it to light by their investigation which was within the three year period.

It is both interesting and important to note that in the *Fleishhacker* case it was decided that the Bank did know that the loans in question were to be used in a venture in which Fleishhacker obtained a bonus interest, yet one

Burgess, who was an assistant in the note department had been told by one Alexander, the head of his department, that Fleishhacker was a partner in the venture and it also appeared that Mortimer Fleishhacker, J. J. Mack and Sigmund Stern, members of the finance committee which approved the loans, knew that the same were to be used in an enterprise in which Herbert Fleishhacker was interested, but thought that Herbert Fleishhacker was personally investing a like amount of money to match the loans in the enterprise.

By comparing the extent and nature of the knowledge and information available to the Bank in the *Fleishhacker* case regarding the wrong committed with the facts and circumstances set forth in the "pleading" in the present case regarding the "fraudulent concealment" of the wrongs and the lack of knowledge or information of the appellant thereof, we are unable to understand wherein and by what means the District Court could conclude, or the appellees claim, that the "defendant corporation" or the "appellant shareholder" acquired any actual or implied knowledge of the appellees' wrong prior to appellant's discovery of the "proceeding" before the United States Securities and Exchange Commission on April 27th, 1939.

We respectfully submit that the bar of the Statute of Limitations does not appear from the face of the pleading, nor does the same show lack of diligence on the part of the appellant in filing her action.

PART THREE.

Relating to Point V [Tr. 493], Specifications (d) and (g) (Br. p. 40), Point VI [Tr. 493, 494], Specifications (d) and (g) (Br. p. 41), Point VII [Tr. 494], Specifications (d) and (g) (Br. p. 42).

Note:

1. The foregoing specifications of error, made under the points above designated, each involve the legal effect, in this action, of the “defendant corporation” transacting its numerous business enterprises through corporate subsidiary departments and instrumentalities.

2. We group these specifications of error for argument to show the error of the court’s “conclusion” requiring appellant to set forth in her “pleading” the part, if any, taken by such corporate subsidiary departments and instrumentalities in the transactions in question.

3. We are unable to determine from the decision of the District Court the precise legal theory upon which its “conclusions” upon this subject justify granting the “motions to dismiss” or the final judgment.

It is our contention that where a parent corporation owns, controls and operates corporate subsidiaries as departments, instrumentalities or agencies for *the conduct of its general business*, the assets and property of such corporate departments are, in equity, the property and assets of the parent corporation, and likewise the losses and debts of such corporate departments are equally the losses and debts of the parent corporation. Independent entities of the corporation departments and agencies are

so far disregarded that each is considered a part of the *individual whole*.

With respect to this point, we direct the court's attention to Paragraph II of the "pleading" [Tr. pp. 144, 145] wherein, among other averments, it is alleged:

"Defendant, Transamerica Corporation, has been at all times since its incorporation, and was at all times herein mentioned, and now is, duly authorized to engage in and engaged in *numerous business enterprises*, including among others a general business involving and devoted to financial, investment, brokerage, insurance, and real estate enterprises, *and also a general business* of organizing, acquiring, holding, owning, controlling, maintaining and operating, other corporations and associations *as its corporate subsidiaries, instrumentalities and departments, in the operation of its said business enterprises*, and including among others, the following corporate subsidiaries, departments and instrumentalities."

With respect to the foregoing averments of the pleading, the District Court states as follows [Tr. pp. 357, 358]:

"The second amended complaint lists twenty-six corporations as subsidiaries of Transamerica. It is there averred that the latter corporation owned, controlled and operated each of these subsidiaries. As heretofore pointed out, plaintiff charges that as the result of a series of various alleged wrongful acts both Transamerica and also in some greater or lesser degree, these numerous subsidiaries sustained substantial losses."

And concludes [Tr. pp. 358, 359]:

“The parties herein sued are entitled to be informed whether plaintiff claims that not only Transamerica but also each and all of these twenty-six subsidiaries, or if only some then which of the latter, acquired all of the capital stock and all of the assets and assumed all of the liabilities of Bancitaly corporation, including the alleged fraudulent salary agreement. Likewise, they ought to be apprised whether she asserts that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, entered upon their books credits and disbursed funds on account of the provisions of said agreement. * * * . In addition they are entitled to be advised whether plaintiff claims that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, participated in the remaining series of alleged wrongful acts, including the so-called Walston and Company transactions, the Pacific Mortgage Company dealings, the so-called Smith and Mallory trust syndicate transactions and the stock market manipulations.”

The following decisions demonstrate the error of the court's conclusions and final judgment upon this subject:

The case of *Kimberly Coal Co. v. Douglas*, 45 Fed. (2d) 25 [6 Cir.], is an appeal from a decision of the District Court refusing to allow, except in a limited amount, a claim filed by the appellant with the appellees as receivers of the Jewett, Bigelow and Brooks Coal Company and the J. B. Stores Company. A prior judgment had been rendered upon the same claim against the Coal Company, *in which litigation the J. B. Stores Company*

was not a party. The court determined that the prior judgment was a bar to the action as against the J. B. Stores Company for the reason that it was merely a subsidiary instrumentality of the Coal Company and had no independent liability. The language of the court is as follows (Opinion p. 27):

“This contention as to the independent liability of the J. B. Stores Company cannot be maintained. If, as is conceded, the J. B. Stores Company was a mere instrumentality used by the Jewett, Bigelow & Brooks Coal Company in the conduct of its business, the property of the Stores Company must in equity be considered the property of the Jewett, Bigelow & Brooks Coal Company and the debts of the subsidiary, the debts of the parent company. The independent entity of the two companies is so far disregarded that each is considered as but a part of the indivisible whole.”

Where the corporate organization and affairs of one railroad company are controlled and dominated by another railroad company through ownership of stock or lease, the roads must be regarded as identical for the purpose of rate making and in this respect the court in *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Association*, 247 U. S. 490, in disposing of the controversy, states (Opinion p. 501):

“While the statements of the law thus relied upon are satisfactory in the connection in which they are used they have been primarily and repeatedly held

not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner *but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies.* * * * In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.”

In the case of *Centmont Corporation v. Marsch*, 68 Fed. (2d) 460 [1 Cir.], the court approves the principle for which we contend and after a careful consideration of many authorities which are named in the decision, states the principle as follows (Opinion p. 464):

“(1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud.

(2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, *as to make it merely an instrumentality or adjunct of another corporation.*

* * *

It is unnecessary to add to the authorities in support of the rule that, where a subsidiary corporation is organized for a special purpose by a corporation

which holds all its capital stock, and dominates and controls its affairs *in carrying out its own business purposes, the subsidiary may be held to be a mere instrumentality for that purpose*, and the court will disregard the corporate form and do justice between the corporation and third parties.”

After the decision in *Kimberly Coal Co. v. Douglas*, *supra*, the same court in *Roof v. Conway*, 133 Fed. (2d) 819, where the precise question, here discussed, was there involved, the court cites numerous supporting decisions and states the doctrine as follows (Opinion pp. 823, 824]:

“Insisting that the *res* involved in the pending petitions of appellants before the Public Utilities Commission of Ohio (that is, the certificate of public convenience and necessity issued to the subsidiary corporation) was not as matter of fact in the custody of the appellee *receivers of the corporation which owned the stock of the subsidiary*, appellants contend that the mere exercise of control by one corporation over another, through stock ownership or through identity of stockholders, does not make either corporation the agent of the other, or merge them into one corporation so as to make the contract of one binding upon the other. This proposition is true, with the qualification that ‘the legal fiction of distinct corporate existence will be disregarded *when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs so conducted as to make it only an adjunct or instrumentality of an-*

other corporation.' Pittsburgh & Buffalo Co. v. Duncan, 6 Cir., 232 F. 584, 587. * * *.

The holding that the separate entity of a controlled corporation will not be recognized if such recognition would result in injustice, is incontrovertible.

From the opinion in Chicago, Milwaukee & St. Paul Railway Co. v. Minneapolis Civic & Commercial Association, 247 U. S. 490, 500, 501, 38 S. Ct. 553, 557, 62 L. Ed. 1229, it appears that, in the argument of the case, emphasis had been laid upon declaration in various opinions of the Supreme Court that mere ownership by one corporation of the capital stock of another does not create identity of corporate interests, or constitute the stockholding company owner of the property of the subsidiary, or create a relationship of principal and agent. The Supreme Court explained that such statements, while satisfactory in their context, had been repeatedly held *inapplicable* where the resort to stock ownership was not for the purpose of participating in the affairs of a corporation in the normal and usual manner *but for the purpose of controlling a subsidiary company so that it might be used as a mere agency or instrumentality of the owning company.* The pronouncement was made that 'the courts will not permit themselves to be blinded or deceived by mere forms of law but regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as justice of the case may require.'

This court has applied the principle that the property and debts of a subsidiary corporation are to be treated, in equity, as those of the company owning its capital stock, where the subsidiary is used as a mere instrumentality in the conduct of the parent company business. *Kimberly Coal Co. v. Douglas* (6 Cir.), 45 F. (2d) 25. * * * A carefully prepared and well reasoned opinion upon the topic under discussion is *Centmont Corporation v. Marsch*, 1 Cir., 68 F. (2d) 460, 464. There after citing and discussing many cases pertinent to the doctrine, the Court of Appeals for the First Circuit stated: 'It is unnecessary to add to the authorities in support of the rule that where a subsidiary corporation is organized for a special purpose by a corporation which holds all its capital stock, and dominates and controls its affairs *in carrying out its own purposes*, the subsidiary may be held to be a mere instrumentality for that purpose, and *the court will disregard the corporate form, and do justice between the corporation and third parties.*'

Comment.

The appellant's "pleading" makes it clear [Tr. Par. II, p. 144] that the "defendant corporation," at all times mentioned, was engaged in *numerous business enterprises*, some of which are specified, and conducted the same by and through corporate subsidiary departments and instrumentalities.

If it were incumbent upon appellant to first ascertain, and then set forth in her pleading, all of the ramifica-

tions in which the appellees may have used such corporate subsidiary departments and instrumentalities in the accomplishment of the wrongs charged, it is reasonable to assume that such information would not, under the circumstances presented by the "pleading," be made available to appellant.

It can also be well understood that appellant, prior to the filing of her action, would be obliged to resort to litigation to obtain the required information. The circumstances of a case of this character make such requirements unreasonable. We find no decision in support of the views of the District Court. The principles of the decided cases herein mentioned seem to make our position solid.

Upon the authority of such decisions we submit that the "conclusion" of the District Court, that the participation, if any, of the corporate subsidiary departments and instrumentalities of the "defendant corporation" in the wrongs committed by the appellees should be set forth in the "pleading," is erroneous. In no event does such "conclusion" justify the granting of the "motions to dismiss" nor the final "judgment" of dismissal.

PART FOUR.

Relating to Point V [Tr. 493], Specifications (l) and (m) (Br. p. 41), Point VI, [Tr. 493, 494], Specifications (l) and (m) (Br. p. 41), Point VII [Tr. 494], Specifications (l) and (m) (Br. p. 42).

Note:

1. The above specifications of error each involve the proposition that the court erred in granting appellee's motions to dismiss, and entering final judgment of dismissal upon the ground that the appellant's "pleading" contains more than one claim or cause of action and must be divided into separate counts, in order to facilitate a clear presentation of the matters set forth.

2. In this discussion we assume that the court's "conclusions" and other remarks, are intended to mean that the "motions to dismiss" are granted, and the final judgment of dismissal entered, because the appellant included in one statement of claim several independent claims or causes of action. *The District Court did not pass upon a motion to separately state claims.*

3. In presenting our views we also assume that the District Court arrived at its "conclusion", "order" and "judgment" upon the erroneous theory that, as *all* of the corporate acts of the "defendant corporation," involved in the wrongs of the appellees, were not caused by the same Board of Directors, the continuity of the conspiracy was intercepted, and the liability of the members of one Board of Directors legally separated from the acts of the others.

4. Our argument also relates to the error of the court's "inferred conclusion" that a director of a corporation

merely by failing to be reelected thereby effectively withdraws from a *continuing conspiracy* into which he had formerly entered, with all other directors, to use corporate funds and property for private and secret profit.

5. Our point with respect to Notes 3 and 4 is that it takes more than a mere passive position or negative act of a conspirator to effectively “withdraw” from a “continuing conspiracy” in order to avoid liability for future acts of his co-conspirators within the scope of the unlawful agreement.

6. Our remarks also present the point that appellant’s action is a suit for an *accounting* for fraud of trustees *of which equity has sole jurisdiction and that all transactions sought to be included in the accounting, however varied in their nature, constitute but one general claim or cause of action.*

As a basis for our comments, hereinafter made, we cite the following decisions which support and illustrate our point that the “pleading” states but a single claim.

The case of *Bremner v. Leavitt*, 109 Cal. 130, is an action for an *accounting* between partners wherein the trial court sustained demurrers for uncertainty upon the grounds that several causes of action were improperly united *and that the complaint contained several causes of action not separately stated.*

In reversing the order of the trial court, the Supreme Court states (pp. 131-132):

“While they are separate and independent matters in the sense that they are varied and different in character, they are not separate causes of action, *but integral parts of one and the same cause.* Respondents

have very evidently fallen into confusion as to what constitutes a separate cause of action in such a case. It is alleged, for instance, among other matters *for which an accounting is prayed*, that at the time of the formation of the partnership, it was agreed that the same should pay the plaintiff the sum of \$1000, with interest, etc., which has not been paid; that the defendants, Leavitt & Woodson have failed to devote their time and services to said partnership business as agreed, by reasons of which the business of said partnership has suffered loss and damage, and that said defendants have devoted all of their time and energies to other enterprises, in which they have made large profits, for which they should be required to account to said partnership; that the plaintiff has personally paid debts of said partnership, for which he has not been reimbursed, and that he has furnished personal property to said partnership for which he has not been paid. These matters, and others of like nature, are regarded and characterized by respondents as ‘a complete jumble of causes of action.’ *It is perfectly obvious that they do not constitute separate and distinct causes of action. They are proper matters to be alleged as grounds for an accounting between the partners, but they are all parts of the same general subject matter, and constitute but one general cause of complaint.*”

Again at pages 132 and 133, it is further stated:

“Equity does nothing by halves, but gives a full relief in such cases. When it undertakes to adjust the differences between partners, it adjusts them all. ‘The whole subject matter in controversy between the parties, which includes all the partnership transactions of each and all the partners, is the subject of the adjudication, and the account and decree must include all

these matters, and leave nothing open for further litigation or controversy. Equity will not adjudicate causes piecemeal.' (Griggs v. Clark, 23 Cal. 427.) The same general considerations apply to the other matters alleged. *It is not only proper, but necessary, to set forth in such an action, all the transactions of the firm and its members sought to be included in the accounting, however varied in their nature, and, taken as a whole, they go to make up and constitute the plaintiff's cause of action."*

The case of *Vernoia v. Supreme Coal & Ice Corporation*, 290 N. Y. S. 447, is a "derivative action" in equity by a stockholder of a corporation directed against the directors and officers thereof. The decision is enlightening upon the subject here under discussion and we take the liberty of setting forth the entire opinion (pp. 447-448):

"In a derivative action in equity by a stockholder to restrain acts of waste by the directors and officers of a corporation, under an unlawful contract in restraint of trade, and to compel an accounting, etc. orders striking out certain paragraphs of the complaint as irrelevant and prejudiced to the defendants and directing plaintiff to serve an amended complaint separately stating and numbering the causes of action alleged in the complaint, reversed with \$10.00 costs and disbursements, and motions denied, with \$10.00 costs, with leave to answer within ten days from the entry of the order hereon. *In our opinion the complaint sets forth a single cause of action in equity*, brought by a stockholder in behalf of the corporation, to annul an unlawful contract made by certain defendants in restraint of trade, to restrain the purchasers and directors of the corporation from continuing the waste

of the corporation property and funds, pursuant to such unlawful contract, and for an accounting, etc. *The facts alleged in the complaint are all connected and are parts of a single conspiracy to give to defendant Rubel corporation a monopoly and control of the ice business in Brooklyn.* There is not a separate cause of action for damages, for conspiracy and another to restrain the unlawful acts of the defendants, directors and officers of the corporation.”

Lake v. Boston Development Company, 50 Utah 347, is an action by stockholders against a corporation and its officers and directors seeking an accounting and injunctive relief with respect to certain illegal and wrongful acts. The court in holding that the complaint with respect to the rights of the corporation contained but one cause of action, states as follows (Op. p. 356):

“We desire to add that it is not possible to lay down any hard and fast rule regarding what may and what may not be incorporated in one complaint or in a single statement in stockholders’ actions, or in any action, for an accounting, where it is alleged that the corporation officers have been derelict and have mismanaged the corporation’s affairs and have wrongfully appropriated the corporation’s property. In an action for an accounting, wrongful acts, if charged against the same individuals, may, as a rule, be incorporated into one statement in the complaint, regardless of how numerous or how involved the alleged wrongs may be. *Under such circumstances, the wrong consists in appropriating the property or property rights of the corporation, and that wrong constitutes but one cause of action, regardless of the number of acts on the part of the wrongdoer. The*

numerous wrongful acts alleged against Vahrenkamp and the officers and directors in this case, therefore, constitute but one cause of action."

In *Kilbourn v. Sunderland*, 130 U. S. 505 (Op. p. 515), it is said:

"The parties stood in a fiduciary relation toward each other, and, in the course of the transactions between them, from 30 to 40 different lots of ground were bought for the complainants in upwards of 15 distinct purchases. As to 5 of these purchases, fraud is specifically charged. A considerable amount of complainant's money was in defendants' hands, and a counterclaim was set up by them in relation to services performed in and about the care of a portion of the property purchased; services covering many payments for taxes, interest, etc.; making of loans and procuring renewals; receipts for advances. *The transactions were all parts of one general enterprise, and claims of a character involving trust relations.* Before the severance of the connection between the parties, Kilbourn and Latta dissolved, and the amounts due from Kilbourn and Latta, if any, and from Latta alone, if any, to Sunderland and Hillyer or to Sunderland, and the offsets and counterclaims of Kilbourn and Latta or of Latta, *all sprang from one series of operations, and required an accounting on both sides,* and that accounting until disentangled by the investigation of the court, was apparently complicated and difficult, 'there can be no real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law,' 1 Story's Eq. Jur., p. 450; and, as the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud

has in equity a more extensive significance than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection, we concur with the Supreme Court of the District in sustaining the jurisdiction."

In support of our claim, that where *all* the directors of a corporation enter into a "continuing conspiracy" to use it for their private gain, the mere fact that some of the directors fail for reelection does not *ipso facto* constitute an effective "withdrawal" or release them from liability for subsequent acts of their co-conspirators pursuant to the same conspiracy, we cite the following decisions.

In determining the essential requirements of "repudiation" or "withdrawal" from a conspiracy, the court in *Hyde v. United States*, 225 U. S. 347 (Op. pp. 369-370), states as follows:

"Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is *different from one that is to be continuous*. If it may continue, it would seem necessarily to follow *the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the later time, he remains an agent during all of the former time*. This view does not, as it is contended, take the defense of the Statute of Limitations from conspiracies. It allows it to all but makes its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a con-

tinuing criminality. *It requires affirmative action, but certainly that is no hardship.* Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, *until he does some act to disavow or defeat the purpose, he is in no situation to claim the delay of the law.* As the offense has not been terminated or accomplished, he is still offending, and we think, *consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence.* The successive overt acts are but *steps* toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the Kissell Case (218 U. S. 601), stated in another way. As he has started evil forces *he must withdraw his support from them or incur the guilt of their continuance.* Until he does withdraw there is *conscious offending* and the principle of the case cited by defendants is satisfied."

The case of *Eldredge v. U. S.*, 62 Fed. (2d) 449, involves a conspiracy to embezzle the funds of a bank. It was necessary to falsify the books each month in order to *conceal* the shortage.

The defense was that the offense was barred by the Statute of Limitations because the defendant Eldredge had withdrawn from the conspiracy three years prior to the last act of embezzlement.

The defendants' withdrawal consisted of a conversation with one of his co-conspirators to the effect that he would no longer participate in or consent to the embezzlement of further sums.

The court determined that the defendant by such conversation did not *effectively withdraw* from the conspiracy, and in so doing, after citing numerous Supreme Court decisions, including *Hyde v. U. S., supra*, states as follows (Op. pp. 451-452):

“We are not persuaded that Eldredge intended to withdraw his assent to *continued concealment* by his associates. But even if he did, it is not enough. A withdrawal from a conspiracy cannot be effected by intent alone; *it must be accompanied by some affirmative action which is effective*. A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set, *he must step on the fuse*. The first abstraction from this bank set in motion a chain of inescapable consequences, if the conspiracy was to succeed. To withdraw, *that chain must be interrupted*; and that is not done by advising his associates to confess. Eldredge must have known that his associates must continue to conceal the shortage, unless they too, were willing to confess and take the consequences. If he had admonished them no longer to falsify the records, which he did not, such admonition would have amounted to no more than a suggestion that all confess their crime; if his associates were not in the mood so to do, such a declaration to them could have been no more than an ineffective gesture.

We hold, therefore, that Eldredge did not manifest an intent, in the conversation with his confederate, that the shortage should be revealed and the crime confessed, but if he did so intend, a manifestation of that laudable purpose to his co-conspirators was not an effective method of disclosure or adequate confession of guilt. * * *

This court in *Buhler v. United States*, 33 Fed. (2d) 382, after mentioning the doctrine of *Hyde v. United States* (*supra*), concerning the elements of a “withdrawal” and “conscious participation,” and citing the case of *Ware v. United States*, 154 Fed. 577 states as follows (Op. p. 384):

“The court did not attempt to lay down any specific rule defining what would be competent or sufficient evidence to establish it. The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial, in practice often taking a wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character. It might of course be shown by a writing, or by an express oral agreement, and we think by conduct wholly inconsistent with the theory of continuing adherence. *But the mere failure to perform an overt act in furtherance of the conspiracy, or mere inactivity not inconsistent with the theory of continuing adherence would not of itself necessarily import withdrawal.*”

COMMENT.

The “conclusions” and remarks contained in the decision of the District Court, upon this subject are stated as follows [Tr. 353, 354, 355]:

“These alleged wrongs are asserted to have commenced with an allegedly fraudulent transaction entered into during the year 1927, in other words, nearly a decade and a half prior to the filing of the present litigation. During that rather lengthy period there were changes in the management of Transamerica through the election of several different boards of directors. Virtually a majority of those defendants

who have been sued by their true names and who had served as directors had ceased to have any official connection with that corporation during the respective periods when it is asserted that all but one of the transactions complained of were consummated.

While it is averred that, with the exception of a few of the partners of Walston and Company, all of the defendants sued by their true names, together with the forty-four other persons listed, had served at one time or another as directors of Transamerica during most of the period within which the alleged wrongs were committed, nevertheless, it is charged that each of the series of transactions complained of stemmed from some corporate act performed by the particular board of directors acting in that capacity at the specific time involved. In other words, but for some corporate step on the part of those certain defendants who functioned as directors at the particular period involved, none of the alleged wrongful transactions could have been effected.

While plaintiff's counsel have argued that all of the acts complained of constituted but a single conspiracy extending over a period of about fourteen years, *we see no escape from the conclusion that by her pleading plaintiff has sought to charge—as hereinbefore outlined—the commission of several separate and distinct series of wrongs, each disconnected from all the others.* We are not persuaded that the evidence which, for example, might tend to prove the so-called fraudulent salary agreement or the alleged wrongs committed in carrying out the provisions thereof, would have any connection with the evidence pertaining to what has been described as the series of Walston and Company transactions, or would throw any light upon the Pacific Coast Mortgage Company deal-

ings, or would be relevant to what has been referred to as the series of Smith and Mallory trust syndicate transactions, or would have any connection with the operations whereby it is claimed Transamerica sustained large monetary losses as the result of engaging in stock market manipulations.

Furthermore, we do not perceive upon what legal theory it may be held that under the facts alleged any one of the aforementioned series of transactions constituted a part of or was bound up with any one or more of the remainder. Nor has any case been cited which would support plaintiff's contention to the effect that alleged wrongful acts, done by certain individuals while carrying out their functions as directors of a corporation, may be charged against others who neither were directors at the time such corporate steps were taken nor were otherwise engaged in the specific transaction involved.

Hence we conclude that each claim founded upon a separate transaction, as herein before outlined, should have been stated in a separate count, and that such separation would have facilitated the clear presentation of the matters set forth. (See Rule 10b, FRCP.)"

It is apparent from the foregoing that *the true sense of appellant's action* has been erroneously disregarded. The wrong consists of secret profits and corporate losses occasioned thereby. The relief requires an accounting in equity to determine the precise extent of recovery.

The District Court obviously confused the “thing amiss” with the several means with which it was accomplished. Merely because delinquent trustees use several methods or means to accomplish a common design, with respect to trust property, does not, for the purpose of suit, divide their general wrong into separate claims, or causes of action.

The court’s conclusions, order and judgment are evidently based upon the erroneous theory that a director of a corporation, who merely fails for reelection, *ipso facto* effectively withdraws from an existing “continuing conspiracy” to use the corporation for private gain and, therefore, wrongs subsequently committed by his co-conspirators, to effect the common design, are not chargeable to him. This view is entirely foreign to the law and the plain import of the pleading. One can be a member of a “continuing conspiracy” with respect to corporate action without being a director and he may continue to be a conspirator after his power to commit a corporate act is taken from him. The decisions heretofore set forth demonstrate the correctness of our position. Here again the District Court, through legalistic construction, has seen several claims where but one exists.

The case of *Bowman v. Wohlke*, 166 Cal. 121, cited by the District Court in support of its “conclusion” [Tr. 355], is strictly a common law action. It is an action to recover damages for malicious prosecution, slander and trespass. It was demurrable by reason of California Code

of Civil Procedure, Section 427. It is clearly distinguished from the present case. In the appellant's action she appeals to equity to judicially establish a trust relationship and decree that appellees *account* for their derelictions and that the extent thereof be determined and judgment entered accordingly.

We submit that the decisions heretofore cited sufficiently demonstrate that the several transactions mentioned in the "pleading" are proper grounds for an accounting, that they are all parts of the same general subject matter and constitute but one general cause of complaint. We believe that it is not only proper but necessary to set forth all transactions to be included in the accounting in a single claim no matter how varied in their nature they may be.

We also urge, from the cases cited, that a conspiring director, who is a member of a continuing conspiracy, must do something more to effectively withdraw from such conspiracy than merely fail of reelection. The authorities mentioned show that an effective "withdrawal" can only be accomplished by *affirmative acts*, in good faith, evidencing a repudiation and abandonment of a continued participation in a conspiracy which he has placed in motion or otherwise aided.

We feel the propriety of directing attention to that part of the District Court's remarks [Tr. 354, 355] where reference is made to the *evidence* which the court *pre-determines* could not or might not be sufficient to connect the appellees' several wrongful transactions. In the light

of the *admitted facts* set forth in the “pleading” we are unable to perceive the materiality of the court’s remarks concerning the persuasive force of the evidence which appellant may offer upon a trial.

In closing this subject permit us to suggest that the present rule of pleading (10(b), F. R. C. P.), with regard to stating claims in separate counts appears to be applicable only, where such a separation facilitates a clear presentation of the matter set forth. It occurs to us that, even upon a motion for a separate statement of claims, it could be an abuse of discretion to order separate counts where, as here, the “pleadings” is orderly, sequential, and each paragraph complete in itself. It seems certain that none of the appellees can experience any difficulty whatsoever in determining and segregating the particular paragraphs of the pleading to which they wish their answer to respond.

PART FIVE.

Relating to Point V [Tr. 493], Specifications (h) and (i) (Br. p. 40), Point VI, [Tr. 493, 494], Specifications (h) and (i) (Br. p. 41), Point VII [Tr. 494], Specifications (h) and (i) (Br. p. 42).

Note:

1. By this discussion we urge that the District Court committed reversible error in receiving and considering evidence upon the hearing of the appellees' "motions to dismiss" and in failing to accept as true the averments of the "pleading."

In support of our points here discussed, we call attention to the following authorities:

In *Ansehl v. Puritan Pharmaceutical Co., et al.*, 61 F. (2d) 131 (8 Cir.), (Op. p. 133), it is said:

" . . . since such a motion to dismiss has taken the place of a demurrer, it is elementary that it *admits of material facts well pleaded in the complaint*, that only defenses in point of law appearing upon the face of the complaint may be considered and that unless it is clear that, *taking the allegations to be true*, no cause of action in equity is stated, the motion should be denied."

In *Stromberg Motor Devices Co. v. Holley Bros. Co., et al.*, 260 F. 220 (pp. 221-222), the rule is stated as follows:

"It is elementary that on such a motion the allegations of material facts which are well pleaded in the bill must be *accepted as true* for the purpose of the motion, and that only defenses in point of law arising upon the face of the bill may be raised in this manner

and called up and disposed of by the court before final hearing.”

The decision of *Edwards v. Bodkin*, 249 F. 562 (p. 564) (9 Cir.), states the principle as follows:

“The motion admitted the truth of the material allegations of the complaint, *and we must now read them as established facts* and determine whether or not they state a cause of action calling for equitable relief.”

In *Vitagraph Inc., et al. v. Grobaski, et al.*, 46 F. (2d) 813, it is said at page 814:

“The practice which prevails in the Federal Courts in disposing of motions to dismiss is to overrule the motion and to allow the case to go to hearing *unless it is made absolutely clear that taking all the allegations of the bill of complaint to be true it must be dismissed at the hearing. The court should not attempt to determine doubtful questions as upon final hearing.* Ultimate rights should be decided only when the court is in possession of the materials necessary to enable it to do full and complete justice between the parties.”

In *Ralston Steel Car Co. v. National Dump Car Co.*, 222 Fed. 590, at p. 592, the rule is stated as follows:

“Under our practice, the federal courts are inclined to allow a case in equity involving important matters to go to issue and proofs, where a doubtful question is raised by the pleadings. *It has been the practice to overrule a demurrer, unless it is founded upon an absolutely clear proposition that, taking the allegations to be true, the bill must be dismissed at the hearing.*”

In *Polk Company v. Glower*, 305 U. S. 5, the court definitely determines this point, in conformity without contention, in the following language (Op. pp. 9-10):

“We are of the opinion that the District Court erred in dismissing the bill of complaint. Plaintiffs did not submit the case to be decided upon the merits upon the bill, answers and affidavits. Defendant’s motion to dismiss, like the demurrer for which it is a substitute (Equity Rule 29) was addressed to the sufficiency of the allegations of the bill. *For the purpose of that motion, the facts set forth in the bill stood admitted.* For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction. *But the findings of the court indicate that evidence, in part at least, underlay the final decree it entered.*”

We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity.”

In *Securities and Exchange Commission v. Gilbert*, 29 Fed. Supp. 654, the same question is treated as follows (Op. p. 655):

“It is conceded by counsel for defendants (as is the well settled law) *that for the purposes of this decision the motion to dismiss admits the truth of all the allegations properly plead.* Defendants contend, however, that whether or not the undivided interests referred to as ‘securities’ is solely a question of law

and that the allegation that defendants have been and are selling securities is a conclusion of law and therefore not admitted by the motion. With this the court cannot agree. As pointed out by plaintiff, doubtless questions of law may enter into the determination as to whether a particular interest is a 'security' but an allegation that the defendants are selling securities is an allegation of fact. It may be upon a trial, after hearing all of the evidence, the court may determine that, as a matter of law, the particular thing being sold is not a 'security' but for the purposes of the present motion the court must consider the allegation as merely one of fact, *and by defendant's motion it is, therefore, for the present purposes, admitted that the defendants 'are now selling securities described by the defendants as "undivided interests," etc.'*"

In *Sherover v. John Wanamaker*, 29 Fed. Supp. 650, the defendant in support of his motion to strike or dismiss submitted an affidavit with respect to some of the facts. The court in deciding that the motion to dismiss could not be aided by an affidavit, states as follows (Op. pp. 651-652):

"Defendant cannot ask the court on this present motion to consider a sample of the alleged infringing mattress, referred to in an affidavit of the general sales manager of the U. S. Rubber Company as the type of mattress sold to John Wanamaker by the U. S. Rubber Company under the trademark 'Royal Foam.' *The motion to dismiss a claim under Rule 12 (b) (6) must be based on the pleading and may not be aided by affidavits.* *McConville v. District of Columbia D. D.*, 26 F. Supp. 295."

Upon this subject in *Lehigh Coal & Navigation Co. v. Central R. of New Jersey*, 33 Fed. Supp. 362 (Op. p. 363), it is stated:

“Defendant filed a motion to dismiss. The motion to dismiss is limited to the allegations of the complaint, and is being the equivalent of a demurrer, the court is called upon to interpret the allegations of such complaint, *and to accept all such allegations as being true* and to determine whether such complaint presents a cause of action based upon the Federal Declaratory Judgment Act.”

COMMENT.

The record in this case discloses that, in considering and deciding the appellees’ “motions to dismiss” and entering the resulting “judgment of dismissal,” the court considered the affidavit of one Hector Campana [Tr. 271-273], the affidavit of Edmund Nelson [Tr. 269-270] a letter from Cosgrove & O’Neil, attorneys for the appellee Amadeo P. Giannini [Tr. 362 to 366] with certain documents purporting to be copies of “minutes of certain meetings” of the Board of Directors of the “defendant corporation.” [Tr. 366-416.]

It is obvious that the foregoing documents were, by the appellees intended, and by the District Court considered, *as evidence* showing that the appellant in December, 1931, received the so-called Walker-Bacigalupi letter [Ex. A attached to affidavit of Hector Campana, Tr. 274-281] and acquired knowledge regarding the Giannini-Bancitaly corporation “salary agreement” and its use up to that time, thereby starting the running of the Statute of Limitations or requiring the application of the doctrine of “laches” to appellant’s action.

It is also clear that, if a trial upon the merits were taking place, the appellant would have the legal right to cross-examine the witnesses concerning the circumstances surrounding the transactions mentioned in such documents together with *the right to deny receipt of the letter* in question and all knowledge and information concerning the various matters set forth in the documents. This at least would give the court an opportunity to weigh the evidence and base proper findings of fact thereon. This evidence is in *direct conflict* with the averments of appellant's "pleading" contained in Par. XLI. [Tr. 183-186.]

In addition to the evidence above mentioned the District Court also considered some of the statements set forth in the Securities & Exchange Commission "order" mentioned in the "pleading" as *established facts* which started the Statute of Limitations or required the application of the doctrine of "laches" as a bar to the further prosecution of appellant's action. [Tr. 347-351.]

It will be observed from the court's remarks in support of its "conclusion", which we specify as error in Point II (Br. p. 36) [Tr. 492], that after summarizing the "order" of Commission, the District Court in considering and weighing the facts set forth therein stated [Tr. 349, 350, 351]:

"It is to be noted that nowhere in the aforementioned order did said Commission declare or even intimate there was reasonable ground to believe that any of the defendants had engaged in a conspiracy or in any of the alleged wrongful acts complained of herein. On the contrary, the above quoted excerpt from said order rather would imply that said Commission believed that the management of Transamerica at

least as it existed in September, 1931, had challenged the legality of the aforementioned credits entered in favor of the defendant A. P. Giannini, also that the Commission found that in 1931 the then existing board of directors of that corporation had been hostile to and had prevented him from drawing any further sums under said credits, and further believed that it was not until some time after 'the change in management in 1932' that he succeeded in withdrawing any additional sums on account of such credits.

Furthermore, in view of the fact that at the time of the filing of the second amended complaint, *namely, after it had been conducting its investigation over a period of about four years, said Commission had not been able to conclude the same, nor had it been able to determine whether Transamerica had failed to comply with any of the provisions of the Securities and Exchange Act or of its rules, or whether it would be necessary or appropriate to suspend or withdraw the registration of Transamerica's capital stock on any of the national exchanges, it can hardly be said that said order of the Commission supports plaintiff's averment to the effect that the disclosures made in said order uncovered the alleged wrongful acts of which she complains in the present lawsuit.*

Indeed the status of the proceeding before said Commission after the lapse of nearly four years as above described, and the further circumstances that the Commission's order, upon which plaintiff apparently mainly relies to justify the very long delay in the filing of the present suit, *contains no recitals supporting the charges she has made herein.*"

The foregoing observations of the District Court indicate that a trial upon the merits of the action had taken place.

The only purpose of referring to the Commission "order" in the "pleading" *was to disclose the circumstances under which the appellant first discovered "suspicious circumstances" concerning the management of the affairs of the defendant corporation.* This was in April, 1939, and places no limitation whatsoever upon the *facts which appellant discovered subsequent thereto.* It is difficult for us to understand the District Court's reason for thinking that appellant based the averments of her pleading merely upon the information contained in such order, and, even if it be true, that the Securities and Exchange Commission did not declare or intimate in said "order" there was reasonable ground to believe that any of the appellees had engaged in a conspiracy or in any of the wrongful acts set forth in the "pleading", *yet such facts may have existed. They were later discovered by appellant.*

We are also at a loss to understand the court's statement to the effect, that the disclosures made in the "order" of the Commission failed to uncover the wrongful acts of which appellant complains. The manner and method by which appellant discovered the facts of the case which she presents by her pleadings are, in ~~one~~^{our} opinion, in no manner *material to a determination of the "motions to dismiss."*

Regarding the District Court's consideration of the Commission "order", permit us to also suggest, that if any portion of the contents thereof is effective for any purpose with respect to the "Statute of Limitations" or "laches", *it must be limited only to a portion of the Giannini-Banc-italy Corporation "salary agreement" transaction.*

Instead of stating, that at the time of the filing of appellant's pleading, the commission had been conducting its

investigation over a period of about four years and had not been able to conclude the same nor to determine the issues involved, *the court would have been fully justified in taking judicial notice of the then status of that proceeding.* We believe that this court, if deemed material, may well take judicial knowledge of the fact *that the hearings before the "Examiner" concerning said "proceeding" were concluded in Philadelphia on April 4, 1944, and are pending the preparation of findings of fact, the advisory report of the Examiner, and the opinion of the Commission.*

It is obvious that the District Court has erroneously treated and considered the appellant's purpose and the legal effect of mentioning the commission's order in her "pleading" and has given a *factual* interpretation thereof which is not justified in considering the appellees' motions to dismiss.

Whatever controversy existed, if any, between any of the members of the several boards of directors of the "defendant corporation," upon a trial of the action, may, and probably will, only tend to establish the facts averred by the appellant in her "pleading." Here again appellant has the right to make, or attempt to make, such a showing upon a trial.

We respectfully and firmly urge, that in the respect here discussed, the District Court committed reversible error irrespective of any other action taken or decision made by it. The decisions which we have heretofore cited lead to no other conclusion. To hold otherwise would overturn all legal precedent, destroy established procedure, and grant courts arbitrary rights to summarily determine important issues.

Explanatory Remarks.

We have limited our discussion, with respect to the errors of the District Court, to the several reasons or grounds expressly stated or inferred in the court's "Memorandum of Conclusions." [Tr. 321-360.]

Some of the grounds mentioned in the appellee's "Motions to Dismiss" do not appear to have been considered or decided by the District Court and are not subject to review.

The District Court's "Memorandum of Conclusions" is the only guide we have concerning the grounds assigned for the court's decision and we have endeavored to submit "specifications of error" which respond thereto.

The greater part of the "transcript of the record" consists of pleadings, documents and argument concerning the appellant's original complaint and first amended complaint which were superseded by the appellant's second amended complaint upon which her case stands. The numerous motions directed toward the appellant's former pleadings were not decided and are not before this court for determination. (*Winter v. Bostwick*, 212 Federal 884 (C. C. A. 7th) (Op. p. 887).) This is likewise true of all of the appellees' motions directed to appellant's second amended complaint here involved, except their "motions to dismiss."

Conclusions.

In our concluding remarks we deem it proper to refer briefly to that part of the District Court "conclusion" [Tr. 360], and order [Tr. 320], granting the appellant permission to file an application for leave to file a third amended complaint.

The “conclusion” and “order” of the Court considered in the light of its “Memorandum of Conclusions,” makes it plain that a third amended complaint, to receive the approval of the Court, must comply with each and all of the adverse conclusions of the Court concerning the present “pleading.” This requires appellant to change the legal theory and basis of her action and substitute a pleading which could not fully protect the interest of the shareholders nor of the “defendant corporation,” and under which, a full and complete presentation of the evidence could not be made.

Counsel for appellant does not claim perfection for the “pleading” here involved and is quite willing, if properly advised, to make any corrections of form which may be required, but on the other hand is unwilling to basically change the legal theory to one which does not give the complete relief to which the shareholders and “defendant corporation” are entitled under the facts.

In view of the errors of the District Court, which are presented herein, we sincerely urge that the judgment of the District Court be reversed and the case remanded for further proceedings.

Respectfully submitted,

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of
TRANSAMERICA CORPORATION and in behalf of all other share-
holders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI, A. H. GIANNINI, AMADEO P. GIANNINI (as Executor of the Last Will and Testament of Virgil D. Giannini, Deceased), BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a national banking association (as Administrator-with-the-Will-Annexed of the Estate of John M. Grant, Deceased), GORDON GRAY, O. D. HAMLIN, T. W. HARRIS, A. P. JACOBS, F. C. STEVENOT, RUSS AVERY, P. A. BRICCA, GEORGE J. DE MARTINI, W. N. LAGOMARSINO, A. J. SCAMPINI, WILLIAM E. BLAUER, LEON BOCQUERAZ, E. H. CLARK, CHARLES N. HAWKINS, W. F. MORRISH, A. J. MOUNT, ALFRED E. SBARBORO, CHESTER H. LOVELAND, P. C. HALE, JAMES A. BACIGALUPI, ARMANDO PEDRINI, GEORGE A. WEBSTER, E. J. NOLAN, C. R. BELL, W. W. GARTHWAITE, GEORGE N. ARMSBY, LOUIS FERRARI, V. SCIALOJA, THEODORE M. STUART, HERBERT E. WHITE, CHARLES DE Y. ELKUS, WILLIAM S. HOELSCHER, CLIFFORD P. HOFFMAN, C. J. SMITH, VERNON C. WALSTON, AMADEO P. GIANNINI, L. M. GIANNINI and CLAIRE GIANNINI HOFFMAN, transacting business as co-partners under the firm name and style of WALSTON & CO., and AMADEO P. GIANNINI (as the Executor of the Last Will and Testament of Virgil D. Giannini, a deceased member of said co-partnership), WALSTON & CO., a co-partnership and TRANSAMERICA CORPORATION, a corporation,

Appellees.

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I.

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SUMMARY STATEMENT.

Appellant as a stockholder thereof commenced this action on behalf of defendant Transamerica Corporation. Thirty-four persons who had served as directors at different times and for varying intervals during the 12 year period covered by the Complaint were eventually named defendants. Other persons who had not been directors or officers of the corporation were also named defendants. The claims alleged injury to Transamerica and 26 of its subsidiaries (specifically named), but no one of which was made a defendant and no one of which was alleged to be wholly owned by Transamerica.

In the First Amended Complaint several claims founded on separate transactions were not stated separately. Upon motion of defendants the court directed that the separate transactions be stated separately. Counsel for plaintiff agreed to plead the claims in separate counts.

A Second Amended Complaint was filed expressly charging a continuing conspiracy involving all separate transactions enumerated in the First Amended Complaint but failed to comply with the court order directing, and the agreement of counsel, that the separate transactions be stated separately. Defendants filed motions to dismiss on the ground that the complaint failed to state a claim and failed to comply with the court order to state separately the various causes of action, and further, that the claims attempted to be stated were barred by limitations and laches and that Transamerica's subsidiaries were indispensable parties. Motions for separate statement, for a more definite statement, and to strike, were also filed. The court granted the motions to dismiss, assign-

SUMMARY STATEMENT—(Continued).

ing as reasons for its action that plaintiff should have stated her claims separately; that there was a failure to state a claim; that the claims as attempted to be stated were barred by the statute of limitations; and that the complaint was indefinite in certain particulars. The court order expressly provided that the plaintiff have a period of forty-five days within which to apply upon notice for leave to file a Third Amended Complaint and requiring service of proposed Third Amended Complaint and Points and Authorities. Plaintiff failed to file or apply for leave to file a Third Amended Complaint within the period. Thereafter the court dismissed the action. From the judgment of dismissal plaintiff has appealed.

No. 10625

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of
TRANSAMERICA CORPORATION and in behalf of all other share-
holders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI, A. H. GIANNINI,
AMADEO P. GIANNINI (as Executor of the Last Will and Testa-
ment of Virgil D. Giannini, Deceased), BANK OF AMERICA
NATIONAL TRUST & SAVINGS ASSOCIATION, a national
banking association (as Administrator-with-the-Will-Annexed of the
Estate of John M. Grant, Deceased), GORDON GRAY, O. D. HAM-
LIN, T. W. HARRIS, A. P. JACOBS, F. C. STEVENOT, RUSS
AVERY, P. A. BRICCA, GEORGE J. DE MARTINI, W. N. LAGO-
MARSINO, A. J. SCAMPINI, WILLIAM E. BLAUER, LEON
BOCQUERAZ, E. H. CLARK, CHARLES N. HAWKINS, W. F.
MORRISH, A. J. MOUNT, ALFRED E. SBARBORO, CHESTER
H. LOVELAND, P. C. HALE, JAMES A. BACIGALUPI, ARM-
ANDO PEDRINI, GEORGE A. WEBSTER, E. J. NOLAN, C. R.
BELL, W. W. GARTHWAITE, GEORGE N. ARMSBY, LOUIS
FERRARI, V. SCIALOJA, THEODORE M. STUART, HERBERT
E. WHITE, CHARLES DE Y. ELKUS, WILLIAM S. HOEL-
SCHER, CLIFFORD P. HOFFMAN, C. J. SMITH, VERNON C.
WALSTON, AMADEO P. GIANNINI, L. M. GIANNINI and
CLAIRE GIANNINI HOFFMAN, transacting business as co-partners
under the firm name and style of WALSTON & CO., and AMADEO
P. GIANNINI (as the Executor of the Last Will and Testament of
Virgil D. Giannini, a deceased member of said co-partnership),
WALSTON & CO., a co-partnership and TRANSAMERICA COR-
PORATION, a corporation,

Appellees.

APPELLEES' BRIEF.

(Italics are ours unless otherwise noted. Except when
stated otherwise all references to Rules are to the Federal
Rules of Civil Procedure.)

Jurisdictional Statement.

The ground of jurisdiction of the District Court is diversity of citizenship (Judicial Code, Sec. 24; 28 U. S. C. Sec. 41, subd. 1). The original, the First Amended and the Second Amended Complaints each alleged the required diversity of citizenship [R. 5-6; 28-31; 146-149], and that more than \$3,000, exclusive of interest and costs, was involved [R. 6; 31; 150].

On June 9, 1943, final judgment of dismissal was entered [R. 448-451]. On September 7, 1943, plaintiff filed her notice of appeal [R. 451-452]. The jurisdiction of this court is founded on Section 128 of the Judicial Code (28 U. S. C. Sec. 225, subds. (a) and (d)).

Opinions Below.

At the hearing of the argument on appellees' motions directed at the First Amended Complaint, the court on June 25, 1942, made an extended statement which is transcribed and appears in the record [R. 457-476].

The court having directed plaintiff to file a Second Amended Complaint [R. 141-142] and such complaint having been filed [R. 143-192], motions directed at this complaint were made by appellees. On April 16, 1943, the court filed its Memorandum of Conclusions, which may be found in the record [R. 321-360].

Neither of these opinions has been officially reported. The opinion rendered April 16, 1943, is printed in the Appendix hereof, page 7 *et seq.*, for the convenience of this court.

Statement of the Case.

Appellant's Statement of the Case (Br. pp. 4-34) is definitely inadequate. It does not present to this court the facts necessary for a proper review of the judgment of the District Court. Appellees' motions directed at the Second Amended Complaint were predicated not only upon the infirmities of that complaint, but also upon proceedings in the action occurring prior to the filing of said complaint [R. 214-215; 235-236; 253; 268; 293; 318]. The District Court in considering the matter took into account said proceedings [R. 321-327].

Accordingly, appellees find it necessary to present the following complete Statement of the Case:

The Original Complaint [R. 4-24].

Appellant commenced this action on April 16, 1941 [R. 24], suing in behalf of Transamerica Corporation (hereinafter called Transamerica), of which she alleged she had been a stockholder since 1929 [R. 5].¹

Appellant named the following defendants: Amadeo P. Giannini (A. P. Giannini), L. M. Giannini, one John

¹It was not until the Second Amended Complaint that plaintiff disclosed the number of shares of Transamerica owned by her, to wit, 57 shares [R. 146]. From a document submitted by her in connection with the Second Amended Complaint, it appears that in 1938 Transamerica had 11,590,784 shares of stock outstanding [R. 417]. The record therefore discloses that appellant had slightly less than 1/2000th of 1% of the outstanding shares of Transamerica—that had Transamerica recovered and collected a judgment for \$10,000,000.00 [R. 62], appellant would have been benefited thereby in an amount less than \$50.00. The significance of the fact that appellant's interest is so trivial will be considered in the argument (*post*, pp. 31-32).

M. Grant; Gordon Gray and ten other individuals ("new directors"), none of whom were directors of Transamerica before 1932 [R. 7]; William E. Blauer and six others ("old directors"), none of whom were shown to be directors of Transamerica after 1931 [R. 7]; Charles deY. Elkus and four other individuals individually and as co-partners doing business under the firm name of Walston & Co.; Bank of America National Trust & Savings Association (in its individual or corporate capacity); and of course Transamerica [R. 4].

There were no fictitious defendants.

It was alleged that Pacific Coast Mortgage Company and certain other named corporations were at all times wholly owned or virtually wholly owned subsidiaries of Transamerica; and that in 1937 Bank of America had ceased to be a wholly owned or virtually wholly owned subsidiary of Transamerica, which thereafter owned approximately thirty per cent of the stock of Bank of America [par. 4, R. 5-6].

Appellant alleged a number of different transactions (so designated by the pleader [R. 15, 20]) and asked for an accounting. It will not be necessary to notice particularly the different transactions, of which there were at least six. Three of them, namely, the third [pars. 21-23, R. 13-15], the fourth [pars. 24-25, R. 15-17], and the sixth [par. 28, R. 18-19] were not repeated in the subsequent complaints. The first [pars. 12-17, R. 8-11], which in its present form appellant designates as the "'Bancitaly Corporation' transactions" (Br. p. 18), survived as the first transaction in the subsequent complaints. The second transaction [pars. 18-19, R. 11-12] which may be referred to as the "Market" transaction

appeared in the subsequent complaints as the fifth transaction.

The fifth transaction [par. 26, R. 17-18], now referred to as the “‘Walston & Co.’ transactions” (Br. p. 21), appears in the subsequent complaints as the second transaction, but in a fundamentally different form.

In addition to the foregoing there were two paragraphs, in one of which it was alleged that from 1937 to date defendants who were officers and directors of Transamerica received remuneration from Transamerica, Pacific Coast Mortgage Company and other subsidiaries and affiliates of Transamerica in excess of that to which they were legally entitled [par. 27, R. 18]. In the other paragraph it was alleged that from 1931 to date A. P. Giannini, A. H. Giannini, L. M. Giannini and John M. Grant had participated in pools for the purpose of manipulating the market value of Transamerica's stock in order to enable them to buy and sell said stock at substantial profits; that they made substantial profits for which they should account to Transamerica [par. 29, R. 19].

It was alleged that “the acts and transactions” referred to were a part of a plot, plan and conspiracy by A. P. Giannini, A. H. Giannini (not then a defendant), L. M. Giannini and John M. Grant; that all of the defendants who have been directors of Transamerica from 1931 to date became parties to said unlawful plot, plan and conspiracy, in that they knew of, acquiesced in and consented to all of the wrongful acts committed [R. 20].

There were further allegations designed to avoid the bar of the statute of limitations [R. 21] and to excuse plaintiff's failure to make demand upon the Board of Directors of Transamerica [R. 21].

The complaint was verified as required by Rule 23(b), [R. 22-23], but all of the allegations, excepting the allegations of plaintiff's citizenship, her stock interest, and the fact that the suit was not collusive, were made upon information and belief [R. 5].

First Amended Complaint [R. 24-64].

The original complaint although filed was not served, and on December 29, 1941, appellant filed her First Amended Complaint [R. 24-64]. She omitted Bank of America National Trust & Savings Association as a defendant in its individual capacity, but named it defendant as Administrator-with-the-will-annexed of said John M. Grant, deceased.

A number of new defendants were added. Defendants A. P. Giannini and L. M. Giannini were now also named as partners of Walston & Co. and were sued in that capacity. In addition, defendant A. P. Giannini was sued as Executor of the Estate of Virgil D. Giannini, and as Executor of the Estate of Virgil D. Giannini, deceased, an alleged member of Walston & Co.

A. H. Giannini and five other individuals (belonging to the class of "old directors") were joined for the first time as defendants, as were Herbert E. White, Theodore M. Stuart, "new" directors [R. 33], and Claire Giannini Hoffman, who was named as a partner of Walston & Co. This firm was also added as a defendant.

All of the defendants above named appeared and are appellees here. In addition, the First Amended Complaint named four defendants, P. C. Hale, Armando Pedrini,

George N. Armsby and Victor Scialoja, who were not served and did not appear.²

The First Amended Complaint also added approximately thirty-five fictitious defendants.

Appellant definitely alleged that she had been a stockholder of Transamerica since March 7, 1929 [R. 27].

Appellant alleged that Transamerica was at all times engaged in the general business of acquiring, holding, owning, controlling and operating other corporations, among others including Bank of America National Trust and Savings Association, a national banking association, Pacific Coast Mortgage Company, a corporation, and other named corporations [par. II, R. 27].

It was alleged that, during all times mentioned in the First Amended Complaint, defendants Amadeo P. Giannini, L. M. Giannini and John M. Grant, now deceased, by and through stock ownership, proxies and various other means and devices, selected and named the officers and members of the Board of Directors of defendant Transamerica Corporation, and controlled, dominated and determined its entire business policies. It was further alleged that the directors and officers of Transamerica did not exercise any business judgment and knowingly permitted their official acts and conduct to be dictated, controlled and dominated by the three defendants named for the purpose of enhancing the personal and individual interests of each of said defendants [R. 34-35]. There were no affirmative allegations of a conspiracy.

²It was suggested in the argument below that Mr. Armsby was outside the jurisdiction and that the other three were dead.

In the First Amended Complaint appellant predicated her right to recovery in behalf of Transamerica on five separate and distinct transactions. An examination will show that these transactions occurred at different times, were of a different character and nature, and were committed by different persons. Briefly, the five transactions were as follows:

1. *Salary agreement, 1927-1938.* Recovery of \$5,-000,000.00 alleged to have been paid to A. P. Giannini under the salary agreement. This transaction consisted of three alleged wrongs: (a) the passage in 1927 by the Board of Directors of Bancitaly Corporation (Transamerica's alleged predecessor) of the resolution giving A. P. Giannini 5% of the profits in lieu of salary and payments thereunder; (b) the assumption by Transamerica on December 27, 1928 [R. 39] of the unpaid balance, and (c) further payments to Mr. Giannini [R. 35-43].³ It was alleged that the 5% was knowingly computed upon "false, fictitious, inflated and untrue book profits" [R. 41]. Although the original complaint set out in some detail the methods employed to inflate the profits of Bancitaly [R. 9-11], no further details were given in the First Amended Complaint, but instead it is recited that the precise extent of said profits was unknown to plaintiff [R. 41].

2. *Walston & Co. transaction, 1932-1938.* Recovery of \$500,000 because of (a) diversion of profitable business to Walston & Co. (in which the Gianninis were alleged to be interested) and the payment "unnecessarily"

³It will be observed that the first two of these alleged wrongs very definitely occurred before plaintiff became a stockholder on March 7, 1929 [R. 27]. (Compare Rule 23(b).)

of large and substantial brokerage fees, and (b) payment of substantial sums of money for use as capital by Walston & Co. [R. 45-47].

3. *Pacific Coast Mortgage transaction, 1932-1935.* Recovery of \$2,000,000.00 profits of Pacific Coast Mortgage Company, the controlling interest of which was alleged to have been obtained in 1932 by the Gianninis with funds advanced by Transamerica, whereby each of said defendants was “unjustly enriched to the detriment of defendant Transamerica Corporation and its shareholders” [R. 50-53].

4. *Mallory-Smith transaction, 1933-1935.* Recovery of \$75,000.00 profits of the Mallory-Smith syndicate in speculative operations in the purchase and sale of Transamerica stock on money advanced by Transamerica. It was alleged that these profits were received by Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini, deceased, and that each of these defendants was “unjustly enriched to the detriment of defendant Transamerica Corporation and its shareholders” [R. 53-56].

5. *The Market transaction, 1933-1936.* Recovery of \$2,250,000.00 alleged to have been paid by Transamerica to Associated American Distributors, Inc. (a Transamerica subsidiary), in reimbursement for expense in soliciting orders from the general public for the purchase of stock of Transamerica [R. 56-58]. In alleging this transaction reference was made to the Pacific Coast Mortgage Company and the Mallory-Smith transactions [R. 56-58].

There were allegations seeking to avoid the bar of the statute of limitations [R. 58-61] and to excuse plaintiff's omission to make demand upon the Board of Directors of Transamerica [R. 61]. It was not alleged that plaintiff had made an appeal to the stockholders.

Plaintiff prayed for the declaration of a trust relationship, for an accounting and for a judgment of \$10,000,-000.00 in favor of Transamerica, for attorney's fees and general relief [R. 62].

As required by Rule 23(b), F. R. C. P., the First Amended Complaint was likewise verified [R. 63]. All of the allegations were made on information and belief [R. 26], except the allegations as to plaintiff's stock ownership, her residence, and the allegations designed to avoid the bar of the statute of limitations.

**Appellees' Motions Directed at
First Amended Complaint [R. 65-140].**

Appellees (Transamerica excepted), appearing singly or in groups, filed a number of motions directed at the First Amended Complaint. All of the appellees moved to dismiss. Most of them moved for an order requiring plaintiff *to separately state* causes of action in separate counts and for a more definite statement or bill of particulars and to strike. The motions for separate statement, generally speaking, requested the court to require plaintiff to state the transactions complained of in three separate counts, (1) the salary agreement transaction, (2) the Walston & Co. transaction, and (3) the Pacific Coast Mortgage Company, Mallory-Smith and the "Market" transactions.

**Hearing on the Motions Directed at
the First Amended Complaint [R. 452-476].**

The motions were argued before the court on June 23, 24 and 25, 1942. As counsel for appellee, A. P. Gianini, was about to argue the motion for a separate statement of transactions, he was interrupted by the court,

who made inquiry of counsel for appellant. The colloquy between the court and counsel for appellant appears in the record [R. 452-454]. It is clear from this discussion that the *court directed, and counsel for appellant agreed, to state separately the separate transactions.*

When counsel for A. H. Giannini, *et al.* (old directors), started to argue the motion for separate statement, the court interrupted with the observation, "We have already ruled favorably on that." [R. 454.]

During the course of the argument the court made reference to a fact which had received publicity some years before, namely, that at one time the A. P. Giannini group was out of control of Transamerica [R. 455-456]. Counsel for plaintiff stated he would be glad "to investigate that matter and take care of it in the amended complaint in conformity with the facts" [R. 457].

On Thursday afternoon, June 25, 1942, the court made an extended statement from the bench, which appears in the record [R. 457-476]. The court examined the various allegations of the complaint, commenting on the numerous transactions alleged [R. 459-470] and particularly upon the fact that plaintiff had alleged matters in respect to the salary agreement and had asked for relief for payments made to Mr. Giannini before Transamerica was incorporated and, of course, before plaintiff became a stockholder [R. 461-462].

Again the subject of separate statement came up, and the following colloquy occurred:

"Mr. Boardman: If the court please, in respect to the question of these items in the complaint that we follow separate items like the salary transaction, the Walston & Co. transaction, and the Mallory trust

transaction, with respect to the court's suggestion that perhaps all are independent and, in a sense, that they should not be united in one complaint, while I feel that we have not exactly done justice to that point, I would like to present a memorandum on it if the court would grant us a little time. I am sincere about that. I think that rule—

The Court: I wonder if perhaps this would not be a way of getting at it and perhaps minimizing the time and the labors of all of us: I have allowed—and I am not certain that this would answer the purpose, but I seem to think that it would—namely, that if an amended complaint were to be filed which would consist of several counts, one in which you would embody as much of the present complaint as you think you still desire to retain, and then a series of additional counts in which you might split up these several different transactions, as they presently appear to me to be, at least, that portion of the problem that I have tried to outline will clearly be presented as fully as the plaintiff can. In other words, you will have done it both the way you now think it ought to be done and the way, at least, I think it is necessary to segregate it; and that will afford an opportunity to the other side to make separate and distinct attacks upon several counts in the bill. And in that same connection I am suggesting that I think we ought to have an opportunity, at least, to rule upon the question as to what liability you claim arose prior to the formation of Transamerica, what liability arose following its formation, and that in turn there, I think some effort should be made to permit those particular defendants who admittedly were directors only up until 1932 to have an opportunity at least, to make their attack because obviously it is conceivable that it might ultimately be held that

liability exists as against them only for the limited periods that they were directors.” [R. 470-471.]

Still later counsel for appellant stated:

“Mr. Boardman: Now, as I said before, we have no objection to separating our complaint into counts on the various statements of the claims * * *.” [R. 473.]

The court then suggested that it would want to reserve until after the amended complaint had been filed its ultimate conclusion in respect to appellees’ contention that the First Amended Complaint was defective in failing to allege an appeal to stockholders of Transamerica or matters in excuse thereof. Counsel for appellant, having admitted that no appeal to the stockholders had been made [R. 474], the court suggested that the amended pleading be amplified in that respect.

The Minute Order of June 25, 1942
[R. 141-142].

The minute order entered at the close of the argument on the motions directed at the First Amended Complaint reads as follows (omitting recitals):

“The Court makes a statement *re* its present views.

It is ordered that the plaintiff serve and file amended complaint within sixty (60) days and that the defendants have thirty (30) days thereafter to plead thereto.” [R. 142.]

The Second Amended Complaint
[R. 143-190].

On August 21, 1942, plaintiff filed her Second Amended Complaint. She did not state separately any of the five transactions. Instead, she stated all of the transactions

in a single count prefaced by elaborate allegations of a civil conspiracy [R. 150-156].

The conspiracy was alleged to have been initiated on October 11, 1928 [R. 150], the date of Transamerica's incorporation [R. 144]. It was alleged that all of the individual defendants, as well as Virgil D. Giannini and John M. Grant, both deceased, together with certain *other persons not named or sued as defendants*, were members of the conspiracy [R. 150]. The "other persons" referred to were those who had been directors of Transamerica at some time during the thirteen-year period, but who had not been named as defendants [R. 160-161]. The allegations referred to therefore allege that everyone who at any time had been a director of Transamerica, including three who were not directors until 1940 [R. 161], after all overt acts were completed [R. 167; 170; 178; 179; 180], as well as Walston & Co. and its alleged partners, were members of the conspiracy.⁴

Generally speaking, it was then alleged in paragraph XIX that the conspirators conspired to use defendant Transamerica and its subsidiaries for their own private benefit, and for such purpose and for their own individual use and benefit [1] "to wrongfully appropriate" moneys and property of Transamerica and its subsidiaries, [2] "to wrongfully use" moneys and property thereof, and [3]

⁴These sweeping allegations were somewhat tempered if not nullified by the allegations of paragraphs XXIV [R. 161] and XXV [R. 162], in which by hypothetical and alternative allegations it was alleged that directors not conspirators were dummies, and if not conspirators or dummies either failed to discover any of the wrongful acts, or having discovered the same knowingly failed to take action. The question whether alternative and hypothetical allegations permitted in the ordinary case by Rule 8(e) (2) are proper in a stockholder's complaint required by Rule 23(b) to be verified, will be considered in the argument.

“to use their official position” with Transamerica “and the confidential and special knowledge gained thereby” [R. 150-151]. Paragraph XIX then sets out the alleged agreement between the conspirators [R. 151-156]. According to the allegations the conspirators agreed as to the *wrongs* to be done Transamerica: [the lettering is the pleader’s] (c) to use moneys and properties of Transamerica and its subsidiaries in their private business enterprises [R. 152]; (d) to assume pretended contracts and cause moneys to be misappropriated to defendants [R. 152-153]; (e) to use official positions and confidential and special knowledge gained thereby for their private gain and profit; to manipulate the stock of Transamerica and cause Transamerica to finance the same [R. 153-154]; (f) to divert business of Transamerica and its subsidiaries to corporations, etc., in which conspiring defendants were interested [R. 154].

The agreed *mechanics* by which these wrongs were to be perpetrated were alleged to be: (a) to maintain voting control of shares of Transamerica [R. 151]; (b) to control the Board of Directors of Transamerica [R. 151-152]; (g) some directors of Transamerica to actively propose, others to remain passive [R. 154-155]; (h) to conceal their operations [R. 155], and (i) if control of Transamerica were lost, to regain control [R. 155-156].

In paragraph XX of the Second Amended Complaint it is alleged that thereafter “from time to time” and for the purpose of effecting said conspiracy, “the said defendants and persons committed and performed the following acts, and engaged in *the following transactions and series of transactions* as set forth in the succeeding paragraphs hereof, namely, XXI to XL, inclusive” [R. 156].

After alleging that said defendants and persons obtained control of all Transamerica stock [par. XXI, R.

156-157] and giving the names of the defendant directors of Transamerica and their periods of office [par. XXII, R. 157-159], and the names and terms of office of the directors who were not defendants [par. XXIII, R. 159-161], the complaint made the hypothetical and alternative allegations [R. 161-162] already mentioned (footnote 4, *supra*).

With certain changes from the allegations of the First Amended Complaint, the Second Amended Complaint, as the trial court later pointed out, charged "the commission of several separate and distinct series of wrongs, each disconnected from all the others" [R. 354]. These five, separate and distinct transactions were pleaded in the Second Amended Complaint in the following order:

(1) The salary agreement transaction (Bancitaly Corporation transaction), paragraphs XXVI-XXIX [R. 162-169]; Recovery \$3,700,000.00 [R. 168];

(2) Walston & Co. transaction, paragraphs XXX-XXXIII [R. 169-173]; Recovery \$548,000.00 [R. 172];

(3) The Pacific Coast Mortgage Company transaction, paragraphs XXXIV-XXXVI [R. 173-177]; Recovery \$2,000,000.00 [R. 177];

(4) The Mallory-Smith Syndicate transaction, paragraphs XXXVII-XXXVIII [R. 178-180]; Recovery \$300,000.00 [R. 180];

(5) The "Market" transaction, paragraph XXXIX [R. 180-182]; Recovery \$2,250,000.00 [R. 181].

Some changes were made, particularly in the transaction involving the salary agreement [R. 162-169]. The allegation of the First Amended Complaint that "Bancitaly Corporation, acting by and through its said Board of Directors" [R. 37] made the salary agreement, was omitted.

The date upon which the stock and assets of Bancitaly Corporation were absorbed and the salary agreement assumed was now alleged to be May 25, 1929 [R. 162], instead of December 27, 1928, as alleged in the First Amended Complaint [R. 39]. The amount sought to be recovered on this transaction was reduced from \$5,000,000.00 to \$3,700,000.00 [R. 165].

In the First Amended Complaint the beneficiaries of the various transactions were alleged to be A. P. Giannini, or A. P. Giannini and certain of his named children. But in the Second Amended Complaint it was generally alleged that "said defendants and persons," *i. e.*, all the alleged "conspirators," were unjustly enriched [R. 167-168; 172; 177; 180].

In the First Amended Complaint the wrongs were alleged to have been done to Transamerica. In the Second Amended Complaint the phrasing was "Transamerica and its subsidiaries, departments and instrumentalities," or words of similar import. The "injury and detriment" alleged to have been suffered by Transamerica and its shareholders in the First Amended Complaint was alleged in the Second Amended Complaint to have been suffered by Transamerica and its subsidiaries, departments, instrumentalities and shareholders.⁵

Interspersed among the allegations setting forth the five transactions were allegations that the matters complained of were concealed [par. XXIX, R. 168-169; par. XXXIII, R. 173; par. XXXV, R. 176; par. XXXVII, R. 179; par. XL, R. 182].

⁵The allegations in reference to the subsidiaries are stated more particularly in the Argument (Point IV, *post*).

In paragraph XLI, appellant made allegations intended to avoid the bar of the statute of limitations. She referred to certain quasi judicial proceedings pending before the Securities and Exchange Commission, and particularly to an order for hearing “which had been released under date of November 25, 1938” [R. 185].⁶ A copy thereof was tendered for filing [R. 185] and will be found in the record [R. 417-445]. It was alleged that on the 27th day of April, 1939, the S. E. C. proceedings were called to appellant’s attention [R. 184], thus she learned for the first time matters, facts and charges contained in said order [R. 185]. There were further allegations that prior to April 27, 1939, she had no notice, knowledge or information, etc. [R. 185], and that upon such discovery of suspicious circumstances she began an investigation which is still proceeding [R. 186].

There were allegations designed to excuse her omission to make demand upon the directors of Transamerica [par. XLII, R. 187], and her omission to make demand upon the shareholders [par. XLIII, R. 187-188].

The prayer asked for the declaration of a trust relationship, for an accounting, and recovery for Transamerica of \$8,798,000.00, for attorneys’ fees, costs and general relief [R. 188-189].

Pursuant to the requirements of Rule 23(b), F. R. C. P., the Second Amended Complaint was likewise verified [R. 190], but all of the allegations, excepting plaintiff’s stock ownership, her residence, her ownership of stock at the

⁶It will be recalled that the First Amended Complaint which alleged new causes of action and brought in a number of new defendants was filed on December 29, 1941, more than three years after the date of the *public release* of this order of the Securities and Exchange Commission [R. 64].

time of the transactions complained of, the allegations relating to her discovery and the allegations relating to her omission to make demand on the Board of Directors, were made upon information and belief.

**Motions Directed at the
Second Amended Complaint
[R. 193-318].**

Appellees (Transamerica excepted) singly or in groups filed motions directed at the Second Amended Complaint, which generally speaking were as follows:

1. Motions to dismiss (Rule 12(b)) for failure to state a claim; claims barred by statute of limitations and laches; Transamerica's subsidiaries indispensable parties, and other grounds; and to dismiss (Rule 41(b)) because of plaintiff's failure to obey the order of court directing that the separate transactions be stated separately [R. 193-195; 218-219; 238-240; 256-258; 283-285; 296-298].

2. Motions for an order directing appellant to state separately the five separate and distinct causes of action [R. 195-199; 220-222; 240-242; 258-261; 285-287; 298-301].

3. Motions for a more definite statement or bill of particulars [R. 199-213; 222-233; 242-252; 261-265; 287-292; 302-316].

4. Motions to strike the entire Second Amended Complaint or designated portions thereof [R. 213-214; 233-234; 266-267; 316-317].

In all the notices of motion [R. 214-215; 235-236; 252-253; 267-268; 317-318], excepting that of Elkus, *et al.*, it was stated that the motions would be made upon the records and files, the affidavit of Hector Campana [R. 271-

281] and the affidavit of Edmund Nelson [R. 269-270] annexed to the motions of A. H. Giannini, *et al.*

In the affidavit of Hector Campana the affiant averred that he was then a Vice-President of Transamerica; that during the years 1930 and 1931 he was an Assistant Secretary of Transamerica; that a few days prior to December 8, 1931, he was given by the officers of Transamerica a letter to the stockholders dated December 9, 1931 (copy of which was annexed, marked Exhibit A [R. 274-281]); that he was directed to have said letter printed and sent to all of the stockholders; that he personally supervised the printing and mailing of said letter and that copies were sent to each stockholder, including appellant [R. 271-272]. The letter of December 9, 1931 [R. 274-281], Exhibit A to the Campana affidavit, contained a statement that in 1927 the directors of Bancitaly Corporation adopted a resolution approving payment to A. P. Giannini of 5% of the profits each year, that during the three-year period, 1927-1930, no less than \$3,700,000.00 had been paid to or placed to the credit of A. P. Giannini; that all of said \$3,700,000.00 had been withdrawn by or upon the order of A. P. Giannini, except an unpaid balance of \$792,000.00, which upon advice of counsel the Board of Directors of Transamerica had refused to pay [R. 275-276].

The affidavit of Edmund Nelson [R. 269-270], attorney of record for appellee Transamerica, averred among other things that on August 6, 1942, he delivered to counsel for appellant herein copies of certain documents, including a copy of said letter of December 9, 1931 [R. 270]; that on the following day he had delivered copies of the same documents to counsel for plaintiff in an action then pending entitled, *Abrams v. Avery, et al.*, and numbered

1393-H on the register of actions of the District Court [R. 269-270].⁷

Briefs were filed in support of, and in opposition to, these motions [R. 449].

**Hearing of the Motions Directed
at the Second Amended Complaint,
October 12, 1942 [R. 477-483].**

Appellees' motions directed at the Second Amended Complaint were heard on October 12, 1942. The court immediately called upon counsel for appellant to justify, if possible, his failure to state separately three, if not four, separate and distinct causes of action [R. 477]. Counsel, attempting to justify, stated that since the earlier pleading "certain things have occurred that caused a change in the pleading, not in the fundamental facts of how the money or property of Transamerica Corporation was used by these defendants, but the way they did it and the legal theory upon which it was done" [R. 479].

In the Second Amended Complaint appellant did not restrict Transamerica's claim for damages to the moneys paid under the salary agreement after December 9, 1931. After counsel for plaintiff had asserted that appellant had not received a copy of said letter [R. 481-482], there was a colloquy among court and counsel as to whether the mailing of this letter was an official act of the Board of Directors of Transamerica Corporation, counsel for certain appellees insisting that it was, referring to the Campana affidavit [R. 482]. Counsel for appellant stated he was advised otherwise [R. 483].

⁷The letter dated December 9, 1931, was pleaded by Abrams [R. 482].

Thereafter additional briefs were filed in support of and in opposition to the motions [R. 449], and on October 27, 1942, counsel for appellee, A. P. Giannini, sent to the court and to opposing counsel a letter [R. 362-366] in which was enclosed a photostatic copy of the minutes of the meeting of the Board of Directors of Transamerica held on December 9, 1931 [R. 366-416]. These minutes substantiated the statement made by counsel for appellees at the hearing on October 12, 1942 [R. 482], that said letter of December 9th was sent out by direction of the Board of Directors of Transamerica [R. 407].

**The Court's Opinion
(Memorandum of Conclusions)
Granting Motions to Dismiss
[R. 321-360].**

On April 16, 1943, the court rendered and filed its Memorandum of Conclusions [R. 321-360].

In this opinion the court first reviewed the proceedings had at the oral argument on the motions directed at the First Amended Complaint, with particular reference to the court's direction and the agreement of appellant's counsel that the transactions be stated separately [R. 321-326]. The court then analyzed the allegations of the Second Amended Complaint, enumerating the five separate and distinct transactions therein alleged. The court referred to the plaintiff's use of conclusions of law in charging fraud and illegality, and her failure to set forth with particularity the ultimate facts constituting the alleged fraud and illegality [R. 336-337] (specified as error, Point I of "Points Upon Which Appellant Intends to Rely on the Appeal" [R. 492], Br. p. 35). The court remarked that the order of the Securities and Exchange Commission, upon which plaintiff relied to justify her delay in

suing, warranted the conclusion that if the bar of the statute of limitations or of laches was to be avoided, it would be necessary for plaintiff to plead other facts [R. 350-351] (specified as error, appellant's Point II [R. 492], Br. p. 36).

The court further pointed out that the pleading was replete with surplusage and repetitions, as well as legal conclusions, including numerous recitals more or less general, vague and indefinite, charging various acts of wrongdoing [R. 353] (specified as error, appellant's Point III [R. 493], Br. p. 37). There were further comments which will be noted in the argument.

The court then made specific rulings, as follows:

- [1] “* * * that each claim founded upon a separate transaction, as hereinbefore outlined, should have been stated in a separate count, and that such separation would have facilitated the clear presentation of the matters set forth. (See Rule 10b, FRCP)” [R. 355]

(citing *Bowman v. Wohlke*, 166 Cal. 121, 135 Pac. 37 [R. 355-357]).

- [2] “* * * that before it can be held that plaintiff has a cause or causes of action against the defendants or any of them, and likewise before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint.” [R. 358]

(specified as error, appellant's Point IV [R. 493], Br. p. 38).

[3] That appellees were entitled to be informed as to certain matters [R. 358-360]. The details of these last rulings may be more logically stated in the argument, where we will also give record references to the items of the motions for more definite statement to which said rulings were responsive.

After making these rulings, the court concluded as follows:

“Plaintiff has amended her complaint twice. In view of this fact, and of the other circumstances and conditions previously noted, we have concluded that each and all of the respective motions to dismiss should be granted. [Specified as error, appellant’s Point V [R. 493], Br. p. 39.] We have further concluded that the appropriate procedure would be, instead of granting plaintiff unconditionally the right to file another amended complaint, to prescribe the conditions upon which she may apply for leave to file a third amended complaint.” [R. 360.]

**Minute Order Granting Motions
to Dismiss [R. 320].**

On the same day, namely, April 16, 1943, the court made its minute order reading as follows:

“For the reasons set forth in the memorandum of conclusions this day filed, it is ordered that each and all of the motions filed on behalf of the respective defendants to dismiss the second amended complaint be granted. [Specified as error, appellant’s Point VI [R. 493-494], Br. p. 41.] It is further ordered that on or before June 1, 1943, plaintiff may file application for leave to file a third amended complaint, provided that such application have attached thereto her proposed further amended pleading, and also be accompanied by a memorandum of supporting points and authorities, provided further that at least ten days

notice shall be given of the hearing of such application.” [R. 320.]

Notice of the order granting motions to dismiss and of the permission granted appellant to apply for leave to file (upon conditions) a further pleading was promptly given [R. 361]. Appellant thus had approaching one and a half months after notice within which to make application for leave to file a third amended complaint.

Judgment of Dismissal [R. 448-451].

Appellant, however, did not apply for leave to file a third amended pleading, nor did she ask for any extension of time therefor, and accordingly the time expired without action on her part [R. 450]. Thereafter, on June 9, 1943, the court entered its judgment of dismissal [R. 448-451]. (Specified as error, appellant's Point VII [R. 494], Br. p. 42.)

Summary of the Argument.

1. The stockholder plaintiff is not suing in her own right—she is asserting the corporation's alleged cause of action. She acts in a capacity analogous to that of guardian *ad litem* and is peculiarly subject to the control of the court and to rules designed to prevent an abuse of her privilege. These basic principles have been overlooked in appellant's opening brief.

2. The action was properly dismissed because of appellant's failure to state separately the claims founded on separate transactions and to obey the direction of the court in that respect.

The claims pleaded in the First and Second Amended Complaints are founded on separate transactions.

Separate statements of each of the five claims would facilitate the clear presentation of the matters set forth.

3. The Second Amended Complaint fails to state a claim because, among other reasons, it clearly appears on the face thereof that each and every cause of action attempted to be set forth therein is barred by the statute of limitations.

If any of the five transactions gave rise to a cause of action, such cause of action arose more than three years before this action was filed.

The Second Amended Complaint does not allege sufficient facts to excuse the failure to commence this action within the statutory period of three years.

If appellant made discovery of the fraud complained of from the order of the Securities and Exchange Commission, then her action is barred as against all defendants as to the third and fourth transactions and as against certain of the defendants as to all of the transactions.

The situation of the appellees Elkus, Hoelscher, Smith, Walston, Clifford Hoffman, Claire Giannini Hoffman and Walston & Co.

4. According to the allegations of the Second Amended Complaint Transamerica's corporate subsidiaries were indispensable parties defendant. The complaint was defective in this respect.

5. The language of the Second Amended Complaint is vague, general and indefinite, and the gravamen of its charges consists of conclusions of law or of the pleader. Accordingly, the Second Amended Complaint fails to state a claim against appellees.

6. Appellant's contention that, in passing on the statute of limitations, the trial court considered as evidence matters *dehors* the Second Amended Complaint is without support in the record.

ARGUMENT.

I.

The Stockholder Plaintiff Is Not Suing in Her Own Right—She Is Asserting the Corporation's Alleged Cause of Action. She Acts in a Capacity Analogous to That of Guardian *ad Litem* and Is Peculiarly Subject to the Control of the Court and to Rules Designed to Prevent an Abuse of Her Privilege. These Basic Principles Have Been Overlooked in Appellant's Opening Brief.

It is a truism that in stockholder's actions the plaintiff is not enforcing her own right. She stands in the shoes of the corporation for whose benefit the suit is brought. The corporation is the real party plaintiff.⁸

The plaintiff's position is analogous to that of a guardian *ad litem* and is peculiarly subject at all times to the control of the court. Under the decisions generally and in the Federal courts by rule (23(c)), she may not voluntarily dismiss or compromise the action without specific court approval.

The foregoing principles are amply sustained by the authorities, a few of which are here quoted:

Smith v. Lewis, 211 Cal. 294, 298, 295 Pac. 37:

"And a stockholder suing on behalf of the corporation, as in this case, has no greater right or standing as plaintiff than the corporation would have had if the corporation itself had been plaintiff. The stock-

⁸The amount for which plaintiff seeks recovery in behalf of the corporation, not her own beneficial interest, determines the jurisdictional amount in Federal actions (*Johnson v. Ingersoll*, 63 F. (2d) 86).

holder stands in the shoes of the corporation. He is the mere nominal plaintiff and the corporation is the real party in interest and if the corporation is not in position to attack the transaction, the stockholder may not. (Turner v. Markham, 155 Cal. 562 [102 Pac. 272]; 6 Cal. Jur., p. 865, and cases cited.)”

Whitten v. Dabney, 171 Cal. 621, 624-625, 154 Pac. 312:

“But no one of the individual wrongs of any of the stockholders is subject to redress in this action. Plaintiffs are allowed to prosecute this action by virtue of their stockholders’ relationship to the corporation, but only for the purpose of redressing wrongs and impositions which the corporation itself had suffered. (Turner v. Markham, 155 Cal. 562 [102 Pac. 272].) These stockholders, as plaintiffs, therefore, occupied a strict fiduciary relationship to the corporation whose interests they were representing. Their position may not inaptly be compared to that of a guardian *ad litem*, to which consideration we will later return.”

In *Denicke v. Anglo California Nat. Bank of San Francisco* (C. C. A. 9), 141 F. (2d) 285, the appeal was from an order of the trial court made over the objection of the plaintiff stockholders approving a compromise and directing a dismissal. Plaintiffs appealed and the judgment was affirmed. The court said that the stockholder-plaintiff’s

“position in the litigation is assimilated to that of a guardian *ad litem* with power in the court, not in the stockholder, to compromise the rights of the real party in interest, which is the corporation itself, *Whitten v. Dabney*, *supra*; *Loeb v. Berman*, 217 Cal. 716, 20 P. 2d 685; *Russell v. Weyand*, 5 Cal. App. 2d

259, 42 P. 2d 381. We are not aware of any federal law to the contrary, and in the present circumstances we think it appropriate if not obligatory on us to apply the local rule."

141 F. (2d) 288.

A stockholder has no vested right to represent the corporation. Rather it is a privilege dependent upon procedural statutes or rules.

Perrott v. United States Banking Corporation
(D. C. Del.), 53 F. Supp. 953, 956:

"Rule 23(b) puts in issue 'the authority of the plaintiff to maintain' his complaint. Cf. *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 34, 21 S. Ct. 251, 45 L. Ed. 410. It seems to me the rule does not go beyond procedure. The action is to recover for a wrong suffered by the corporation. Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court. It is the same as the minor who is struck by the bus. Procedurally, the child is unable to seek redress for the wrong done him in his own person. This does not, however, affect his right of action. Procedural remedies are available by the appointment of a next friend, a guardian *ad litem*, or a trustee to prosecute the cause of action. The criticism that federal courts will not be dispensing the same justice that could be obtained in a state court in stockholders' derivative actions if Rule 23(b) is applied when in conflict with the state rule, ignores one of the original purposes of promulgating the rule and the evils it attempts to destroy. Cf. *Moore*, op. cit., pp. 2246-2253, 2250-2253, 2265."

Klum v. Clinton Trust Co. (N. Y. S. C.), 48 N. Y. S. (2d) 267, 268, is in accord. This case holds that a recently enacted New York statute which, like Rule 23(b), precludes a stockholder from maintaining an action in behalf of the corporation on account of transactions occurring before he became a stockholder, is procedural and applicable to pending actions.⁹

But in order that the privilege of representing the corporation may not be abused, the courts by rule or decision have placed conditions and limitations upon the stockholder. None of the courts has been stricter in this regard than the Supreme Court of the United States. The rules laid down with particularity in *Hawes v. Oakland*, 104 U. S. 450, 460-461, and there expressly made applicable to all stockholder's actions, whether involving fraud or not, were carried into Federal Equity Rule 27 and were readopted without substantial change as Rule 23(b), which reads as follows:

“(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise

⁹The court pointed out that “While a stockholder's derivative action may serve a useful purpose, it is very often grossly abused and utilized for reasons disconnected with the interest of the corporation.” 48 N. Y. S. (2d) 268.

have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

As already pointed out, plaintiff is the owner of 57 shares of the capital stock of Transamerica [R. 146], or slightly less than 1/2000th of 1% of the outstanding stock [R. 417]. Despite this small interest, if plaintiff complied with the conditions prescribed in Rule 23(b), F. R. C. P., she may nevertheless represent the corporation in respect to transactions occurring after she became a stockholder, but the court will require a very clear case to authorize the maintenance of the action.

In the well known and oft cited case of *Dannmeyer v. Coleman*, 11 Fed. 97, at pages 101-102, Circuit Judge Sawyer said:

"It is always a suspicious circumstance where a single stockholder, among a large number in a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim, *de minimis non curat lex*, very properly applicable; which would be the case in this instance but for the enormous, not to say astounding, amounts alleged upon information and belief, only, to have been fraudulently appropriated."

Other authorities support the proposition that where the stockholder's interest is insignificant when compared with the amount of stock of the corporation issued and outstanding, a very clear case must be made out before the court will authorize the suit.

In 4 *Thompson, Corporations* (2d Ed.), 1034, Sec. 4566, it is said:

“Where the holding is insignificant in amount the court will require a very clear case to authorize the action by the stockholder. Thus in a case where the act was not *ultra vires* and the case not clearly made out the court refused to interfere at the instance of one whose holding was only one hundred shares out of a capital stock of three hundred fifty thousand shares.”

The rule upon which we rely is clearly stated in *Trimble v. American Sugar-Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912, at 914, where Vice Chancellor Pitney (later Mr. Justice Pitney of the United States Supreme Court) speaking of a case where the plaintiff held $\frac{1}{7}$ of 1% of the whole issue of stock, said:

“Admitting that the holder of so small a part of the stock is entitled to be heard in this court for the correction of any real grievance he may suffer by the misconduct of the majority, yet I think it is the duty of the court to require that he should show a clear case by distinct affirmative allegations, even if they should necessarily include some of a negative character. In short, he must anticipate and exclude all reasonably probable conditions which may bar his relief.”

Throughout her brief appellant has overlooked these principles. She treats the case as if she were the owner of the alleged cause of action—as if she were here suing to enforce her individual rights.

Before answering appellant's argument we desire very briefly to call the court's attention to a matter occurring since the judgment below was entered and which we think furnishes additional grounds for the District Court's conclusion that appellant should state separately the separate and distinct transactions and should be required to make out a clear case against the appellees.

Until recently, with exceptions not here necessary to notice (see article, 31 *California Law Review*, p. 515), a stockholder could commence and maintain a stockholder's action without imposing any direct liability or detriment upon the corporate ward other than the disturbance in operations and in producing records and the giving of depositions by its officers and employees.¹⁰

¹⁰The District Court mentioned the fact that appellant is a resident of New York and that the principal office of Transamerica is in San Francisco in the Northern District of this state, and pointed out that many corporate records would need to be transported for the purpose of the trial. The court said that just why the litigation should have been filed in the Southern District was not quite clear [R. 346]. Counsel for appellant, commenting on this language, say that "the court's apprehension" in this regard "leaves us somewhat confused" (Br. p. 66). Counsel's statement overlooks the fact that appellant "occupied a strict fiduciary relationship to the corporation" (*Whitten v. Dabney, supra*, 171 Cal. 625) with a duty to place its interests foremost. In making the foregoing observation the trial court apparently had in mind the principle laid down in *DeLoach, et al. v. Crowley's, Inc.* (C. C. A. 5), 128 F. (2d) 378, 380 (quoted and relied on, Br. pp. 51-52), that "Expensive trial of meritless claims are sought to be avoided in the main by pre-trial and summary judgment procedures."

A stockholder ordinarily incurs no expense. It is a notorious fact that stockholder's derivative suits have become a fertile field of operations for attorneys proceeding upon the contingency alone of recovery and court award of exorbitant fees (see 39 *Columbia Law Review*, 784, 814). The stockholder plaintiff subjects the officers and directors of the corporate ward to litigation (vexatious if they are exonerated), but until recently at least it was generally thought that the limitations such as are found in Rule 23(b) and the ordinary rules of procedure obtaining in fraud actions (Rule 9(b)) were a sufficient protection to the individual defendants.¹¹

Recently, however, the legislatures of some of the states, recognizing the inherent injustice of the situation, have authorized recovery from the corporation by its exonerated officers, directors and employees of their expenses, including reasonable attorneys' fees.¹²

¹¹The record herein shows the existence of two other stockholder's actions, *Breakstone v. Giannini*, Los Angeles Superior Court No. 435131 [R. 79], and *Abrams v. Avery*, United States District Court, Southern District of California, No. 1393-H [R. 269]. A judgment of dismissal for want of prosecution was entered in the *Breakstone* case and an appeal is now pending. The *Abrams* action was dismissed, but no appeal was taken. See also *Greenberg v. Giannini* (C. C. A. 2), 140 F. (2d) 550, judgment of dismissal affirmed because of want of jurisdiction over Transamerica, an indispensable party.

¹²California Statutes, 1943, Ch. 934, Sec. 1 (Civil Code, Sec. 375, discussed in the body of the brief); Kentucky Acts, 1942, Ch. 40, Sec. 1; New York, General Corporation Law, 1941, Chap. 209 and Chap. 350, amending Sec. 61-A of the General Corporation Law. New York has recently enacted Sec. 61-B of the General Corporation Law (Laws of 1944, Ch. 668), which requires stockholders having less than five per cent of the outstanding stock, unless such stock has a market value of \$50,000 or more, to post bond to indemnify the corporation and its officers. This new section has been held constitutional and applicable to pending actions (*Shielcrawt v. Moffett*, New York Law Journal, May 17, 1944, p. 1905). 49 N. Y. S. (2d) 64

In 1943 California enacted such a statute (*California Civil Code*, Section 375, quoted in full in the Appendix, pp. 1-2). Under the principle decided by the Supreme Court of California in the recent case of *Sacramento Municipal Utility District v. Pacific Gas & Electric Company* (1942), 20 Cal. (2d) 684, 128 P. (2d) 529 (certiorari denied 318 U. S. 759), it seems reasonably certain that Section 375 is to be construed as creating a new substantive right in the director, officer or employee of the corporation and is applicable to stockholder's actions commenced in the Federal courts in California.¹³

Heretofore a stockholder's action in the courts in California, either state or Federal, was brought for the benefit of the corporation and if successful would result in a judgment in favor of the corporation, without however any direct pecuniary detriment to the corporation in the event the action were unsuccessful. Now, however, this has been changed, and the stockholder by prosecuting the action creates a contingent liability easily conceivable of considerable magnitude on her corporate ward.¹⁴

¹³In the case cited the California Supreme Court held that Section 526(b) of the Code of Civil Procedure, which gives to a municipal utility the right to recover its expenses, including attorney's fees incurred in its successful defense of an injunction action brought by a competing corporation, created a substantive right in the municipal utility which was entitled to recover even though the injunction action was instituted in the Federal courts.

¹⁴Even before the enactment of Section 375 of the California Civil Code, a California court had allowed the sum of \$60,000 as fees to the attorney of a single director because the director's acts had resulted in a direct and tangible benefit to the corporation (31 Cal. Law Review, p. 519). The author of this Law Review article thought that this theory (for which simple indemnity is substituted by said Section 375) was unsound and unsatisfactory, but that the award was reasonable (31 Cal. Law Review, p. 519).

The Federal Rules of Civil Procedure and the decisions of the courts generally, as we shall show, furnish ample authority for the action of the court below. Section 375 of the California Civil Code, while of course not affecting either the procedure, power or jurisdiction of the Federal courts, brings in practical considerations which cannot justly be ignored.

As the New York Appellate Division, referring to the recently enacted New York indemnity statute (Sec. 61-A) said:

“When we find a stockholder, owning fifty shares out of upwards of seven million shares, seeking to enforce alleged rights of his company, with the possibility of subjecting it to these large statutory costs and expense in the event of failure, we think it is the duty of the courts to require at least the statement of more than a mere general charge of wrongdoing before resort to equity may be had.”

Weinberger v. Quinn, 264 App. Div. 405, 35 N. Y. S. (2d) 567, 572 (affirmed without opinion, 290 N. Y. 635, 49 N. E. (2d) 131).

II.

The Action Was Properly Dismissed Because of Appellant's Failure to State Separately the Claims Founded on Separate Transactions and to Obey the Direction of the Court in That Respect. (Answering Appellant's Point Four, Br. pp. 97-111.)

Appellant's failure in her Second Amended Complaint to state separately the claims formed the basis of two attacks by appellees, (1) as one of the grounds of the motions to dismiss [R. 195; 219; 240; 257-258; 284-285; 298], and (2) as the ground for their motions for a separate statement of claims [R. 195-199; 220-222; 240-242; 258-261; 285-287; 298-301].

The District Court in its Memorandum Opinion held that the five claims should have been stated in separate counts and that such separation would have facilitated the clear presentation of the matters set forth [R. 355].

Rule 10(b) provides:

“* * * Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.”

Rule 41(b) provides:

*“For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. * * *”*

If the action of the trial court in directing plaintiff to make a separate statement of claims was proper under Rule 10(b), then the judgment of dismissal was correct under Rule 41(b).

Blake v. De Vilbiss Co. (C. C. A. 6), 118 F. (2d) 346.

In *Refior v. Lansing Drop Forge Co.* (C. C. A. 6), 124 F. (2d) 440, certiorari denied 316 U. S. 671, a stockholder's action was dismissed because of plaintiff's failure to proceed with the trial and his refusal to comply with the court's order continuing the case for one week upon the payment by plaintiff of \$100.00 in costs. The Circuit Court of Appeals said:

"Every litigant has the duty to comply with the reasonable orders of the court and, if such compliance is not forthcoming, the court has power to apply the penalty of dismissal."

124 F. (2d) 444.

**The Claims Pleaded in the First
and Second Amended Complaints Are
Founded on Separate Transactions.**

Appellant, in arguing that only one cause of action was pleaded in the Second Amended Complaint (Br. pp. 97-111), makes a contention which is equally applicable to the First Amended Complaint, namely—that she has pleaded one cause of action for an accounting. She asserts that in this action, "she appeals to equity to judicially establish a trust relationship and decree that appellees *account* for their derelictions" (Br. p. 110, italics appel-

lant's). She attempts to distinguish a case cited by the District Judge on another point by saying that it was "strictly a common law action" (Br. p. 109).

Officers and directors of a corporation are held to a fiduciary standard applicable to trustees (*Lofland v. Cahall*, 13 Del. Ch. 384, 118 A. 1, 3), and for some purposes they will be treated as "trustees" for the stockholders collectively, "which is only another way of saying that they are trustees for the corporation" (3 *Fletcher, Corporations* (perm. ed.), p. 151). Even if an individual stockholder were entitled to maintain an action for an accounting against the corporate officers, plaintiff is not here enforcing a personal right—she stands in the shoes of Transamerica (*Smith v. Lewis*, 211 Cal. 294, 298, 295 Pac. 37, quoted *supra*). Moreover, the trivial amount of appellant's interest in this case (less than \$50.00) would exclude the jurisdiction of the Federal courts.

The fact that since plaintiff is suing derivatively in the right of Transamerica she is perforce "in equity" does not convert a legal action into an equitable one. The essential character of the causes of action belonging to the corporation remain the same, whether brought by the corporation or by a stockholder suing in its behalf.

Cwerdinski v. Bent, 256 App. Div. 612, 11 N. Y. S. (2d) 208; affirmed without opinion, 281 N. Y. 782, 24 N. E. (2d) 475.

See also:

Dunlop's Sons Inc. v. Dunlop, 259 App. Div. 233, 18 N. Y. S. (2d) 818, 819;

Singer v. Carlisle, 26 N. Y. S. (2d) 172; affirmed without opinion, 26 N. Y. S. (2d) 320.

In *Cwerdinski v. Bent*, *supra*, the Appellate Division said:

“A shareholder is in no better position than the corporation, even though the complaint is addressed to the equity side of the court.”

11 N. Y. S. (2d) 210.

The Appellate Division then quoted with approval from authorities sustaining this proposition, including the following excerpt from *Morawetz on Corporations* (Sec. 271) as quoted in the opinion of Mr. Justice Lurton in *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 648, 649, 15 S. W. 448, 452:

“‘A suit of this character is brought to enforce the corporate or collective rights, and not the individual rights of the shareholders. It may therefore properly be regarded as a suit brought on behalf of the corporation, and the shareholder can enforce only such claims as the corporation itself could enforce. *Moreover, the essential character of a cause of action belonging to a corporation remains the same, whether the suit to enforce it be brought by the corporation or by a shareholder.* Thus a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action, as to limitations, etc., because a shareholder has brought suit in equity to enforce it on behalf of the company.’”

11 N. Y. S. (2d) 211.

If the suit had been brought by Transamerica, it is clear that the claims founded on the first, second and fifth transactions would not have been actions for an accounting.

While the pleader stigmatizes the salary agreement with Bancitaly Corporation as "pretended, fraudulent and fictitious" [R. 162], and asserts that the Board of Directors of Transamerica "without legal right or authority" caused Transamerica and its subsidiaries, etc., to acquire the assets of Bancitaly Corporation and to appear to assume as its own the "pretended, fraudulent and fictitious, salary agreement" [R. 162], the validity of agreements providing for incentive compensation is now too well settled (*Church v. Harnit* (C. C. A. 6), 35 F. (2d) 499, 501) to be successfully assailed as wholly void by any such allegations as those mentioned. And this is true even if it be assumed that, contrary to the usual rule (*Matthews v. Ormerd*, 140 Cal. 578, 583, 74 Pac. 136; *Patten v. Pepper Hotel Co.*, 153 Cal. 460, 467, 96 Pac. 296) Transamerica (or a stockholder standing in its shoes) may retain the assets of Bancitaly Corporation and yet denounce its obligation as wholly void. Whatever may be the theory, the claim founded on the first transaction, if brought by Transamerica or its subsidiaries, would not be a cause of action for an accounting, but merely a legal action for money had and received.

In *Cwerdinski v. Bent*, *supra*, the court said (11 N. Y. S. (2d) 210):

"The purpose of the first cause of action is to compel the parties who were the recipients of the bonuses to return to the corporation the difference between the sums actually received by them and the amounts which should have been paid under the bonus plan. In short, the first cause of action involves sums of money which these appellants, and other individual defendants, are said to have received wrongfully from the New Jersey corporation. Since that is so, the

corporation could have instituted an action for money had and received, and consequently no accounting would have been necessary.”

In the second or Walston & Co. transaction the amount sought to be recovered is equal to the amount paid to Walston & Co. from the funds of Transamerica and its subsidiaries for use as capital and as brokerage fees on business diverted [R. 171-172]. This second claim is not an action for an accounting.

Dunlop's Sons Inc. v. Dunlop, 259 App. Div. 233,
18 N. Y. S. (2d) 818, 819.

In this case plaintiff corporation brought an action against certain of its former officers for an accounting and the recovery of “profits” made by said officers in selling property to the corporaion at an excessive price. Plaintiff contended, and the trial court held, that the New York ten-year statute of limitations applicable to cases of accounting was controlling. Upon defendants’ appeal the order was reversed and the motion to dismiss granted. The Appellate Division said:

“What we have in this case is a claim for the return to the corporation of a loss suffered by the corporation. The amount of the loss is the same as the amount of the so-called ‘profit’ received by the defaulting officers and directors. The wrong done to the company is no different from the wrong done to a corporation when an excess salary is paid to an officer or when gifts are made to strangers or when bonuses are wrongfully paid. The exact amount of the loss is known. Though the pleader may call this loss to the corporation a ‘profit’ to the unfaithful fiduciary which ought to be ‘accounted for,’ the pleader’s characteriza-

tion of the resulting legal situation with the intention of producing the application of a particular statute of limitations is not binding in any way on the court. The wrong pleaded is not a claim for profits in the sense in which that term is properly used in stockholders' actions.

"Where bonuses are wrongfully paid, the six-year statute of limitations, Civil Practice Act, Sec. 48, is to be applied. *Cwerdinski v. Bent*, 281 N. Y. 782, 24 N. E. 2d 475. This court has held that the six-year statute applies also to payments of excess salaries and to the sale of stock by directors to the corporation at prices in excess of the market value. *Davis v. Cohn*, 256 App. Div. 905, 9 N. Y. S. 2d 881. We cannot distinguish the sale of stock by directors at a price in excess of the market value from the sale of a factory to a corporation under similar conditions."

18 N. Y. S. (2d) 820.

The rule announced in the *Dunlop* case has been applied to a stockholder's action (*Singer v. Carlisle*, 26 N. Y. S. (2d) 172, affirmed without opinion, 26 N. Y. S. (2d) 320).

The fifth or "Market" transaction, (*i. e.*, recovery for sums disbursed in soliciting purchases of Transamerica stock from the general public), is not an action for an accounting. At most it is merely recovery of damages for alleged waste of corporate funds (compare *Singer v. Carlisle, supra*).

The cases cited by appellant do not lead to a contrary conclusion.

In *Bremner v. Leavitt*, 109 Cal. 130, 41 Pac. 859 (quoted Br. pp. 98-100), plaintiff was suing in his indi-

vidual right for an accounting by his partners. The case turned upon the proposition, the language of which is not quoted by appellant, to wit:

“Partners cannot sue one another at law for any breach of the duties or obligations arising from that relation. This can only be done in chancery by asking a dissolution and accounting, and, if damages accrue from any cause in such proceeding, they must be adjusted by some appropriate method in that tribunal.”

109 Cal. 132.

Observe that in the case at bar if Transamerica (or its subsidiary) were the party plaintiff, it could have sued at law as to the first, second and fifth transactions.

Moreover, as to these transactions if any accounting be necessary, it is merely incidental (*Wrightson v. Dougherty*, 5 Cal. (2d) 257, 262, 54 P. (2d) 13.)

In the case just cited the surviving partner brought an action against the administratrix of the deceased partner to recover certain of the partnership property. Plaintiff contended that since this involved partnership rights, the statute of limitations did not commence to run until the business of the co-partnership was substantially closed (5 Cal. (2d) 261). Overruling this contention and affirming judgments of nonsuit and on the pleadings in favor of the defendants, the Supreme Court held that the statute governing actions in replevin (Sec. 338, C. C. P.) was controlling. Quoting from a decision of the District Court of Appeal, the Supreme Court said:

“This action is essentially one of replevin. The demand for an accounting to determine what property actually belongs to the partnership assets does not

change the nature of the proceedings. The requested accounting is merely incidental to the demand for possession of the property.' ” (5 Cal. (2d) 262.)

In *Vernonia v. Supreme Coal & Ice Corporation*, 290 N. Y. S. 447 (quoted by appellant, Br. pp. 100-101), the stockholder's action involved a single contract and payments connected therewith.

The language of the Utah court in *Blake v. Boston Development Company*, 50 Utah 347, 167 Pac. 672 (quoted by appellant, Br. pp. 101 and 102), was *dictum* and the judgment of dismissal was affirmed because the plaintiff had joined causes of action against the corporation with a cause of action in its favor. The case has never been cited.

In the language quoted from *Kilbourn v. Sunderland*, 130 U. S. 505 (Br. pp. 102-103), the Supreme Court was sustaining the jurisdiction of the District Court *in equity*. The case was a true action for an accounting brought by principals against their agents. It does not seem to be particularly apt, since the fact that the stockholder plaintiff is in equity does not change the essential character of the action (*Cwerdinski v. Bent*, *supra*, and cases following it).

The pertinent language of Rule 10(b) is “Each claim founded upon a separate transaction * * *.” It is significant that plaintiff herself has referred to the five transactions as “transactions or series of transactions” [par. XX, R. 156].

An examination of the Second Amended Complaint discloses, we believe, that there were claims founded upon five separate and distinct transactions within the meaning

of Rule 10(b), as well as constituting separate claims or causes of action under code pleading. As the trial court succinctly declared,

“* * * plaintiff has sought to charge * * * the commission of several separate and distinct series of wrongs, each disconnected from all the others” [R. 354].

Passing over for later consideration the charges of conspiracy, it will be observed that the participants in each transaction are not “the same individuals” (*Blake v. Boston Development Co.*, *supra*—quoted by appellant, Br. p. 101). The defendant directors of Transamerica who became such not earlier than January 8, 1929, and ceased to be directors in 1931 [R. 158] had no personal participation or *ability* to participate in the second and subsequent transactions, none of which was initiated prior to 1932 [R. 169, 173, 178, 180]. Moreover, the theory of the third (Pacific Coast Mortgage Company) and the fourth (Mallory-Smith Syndicate) transactions is the use by the conspirators of their official positions with Transamerica Corporation and its subsidiaries and the confidential and special knowledge and information gained thereby [R. 177 and R. 179-180]. But the profits of the company and the syndicate for which recovery is here sought were not earned or collected prior to 1933 [R. 176 and 178]. Appellees who had ceased to be directors in 1931, of course, could have no official position which they could misuse to the detriment of Transamerica and its subsidiaries. Again, a number of the Walston partners do not appear to have been officers or directors of Transamerica or any of its subsidiaries *at any time*.

As to the recovery sought, each claim is separate and independent. In each of the claims set forth in her Second Amended Complaint appellant has alleged, first, a definite sum disbursed by Transamerica and its subsidiaries or profits received by appellees, and second, the amount of injury to Transamerica and its subsidiaries. The amount of injury alleged in any particular claim is in each case identical with the definite sum theretofore alleged in that particular claim, to wit: first transaction, sums disbursed under the salary agreement \$3,700,000.00 [R. 167], damages \$3,700,000.00 [R. 168]; second transaction, amounts paid and advanced to Walston & Co. for use as capital and as brokerage fees \$548,000.00 [R. 172], damages \$548,000.00 [R. 172]; third transaction, profits earned and collected by Pacific Coast Mortgage Company \$2,000,000.00 [R. 177], damages \$2,000,000.00 [R. 177]; fourth transaction, profits earned and collected by Mallory-Smith Syndicate, \$300,000.00 [R. 180], damages \$300,000.00 [R. 180]; and fifth transaction, items of expense incurred and substantial losses suffered in alleged manipulation of the market \$2,250,000.00 [R. 181], damages \$2,250,000.00 [R. 181]. The aggregate of these various amounts of injury is \$8,798,000.00. The prayer for judgment is for not less than \$8,798,000.00 with interest [R. 189]. The District Judge in his opinion mentioned these facts [R. 352-353], but appellant has not attempted to explain away their significance.

There is no overlapping among the transactions, no continuity. The fraudulent intent and purpose of appellees alleged in each of the five claims, namely, to enhance their personal and individual interests, do not make one transaction of the five.

As we already pointed out, some of the alleged wrongs are legal in their nature, some may be considered equitable. The theories involved are different. The alleged *causes* of action are different. The District Court made this plain in its opinion where, after analyzing the five claims, it said:

“* * * we see no escape from the conclusion that by her pleading plaintiff has sought to charge—as hereinbefore outlined—the commission of several separate and distinct series of wrongs, each disconnected from all the others. We are not persuaded that the evidence which, for example, might tend to prove the so-called fraudulent salary agreement or the alleged wrongs committed in carrying out the provisions thereof, would have any connection with the evidence pertaining to what has been described as the series of Walston and Company transactions, or would throw any light upon the Pacific Coast Mortgage Company dealings, or would be relevant to what has been referred to as the series of Smith and Malloy trust syndicate transactions, or would have any connection with the operations whereby it is claimed Transamerica sustained large monetary losses as the result of engaging in stock market manipulations.

Furthermore, we do not perceive upon what legal theory it may be held that under the facts alleged any one of the aforementioned series of transactions constituted a part of or was bound up with any one or more of the remainder.” [R. 354-355.]

Appellant criticizes this language, saying that the court disregarded the true sense of appellant's action (Br. p. 108) and obviously confused the “thing amiss” with the several means with which it was accomplished (Br. p. 109). Appellant says:

“Merely because delinquent trustees use several methods or means to accomplish a common design,

with respect to trust property, does not, for the purpose of suit, divide their general wrong into separate claims, or causes of action.” (Br. p. 109.)

But appellant has not charged “delinquent trustees” with a “general wrong.” No single substantive wrong is recognized under California law merely because the defendants are “delinquent trustees.” This is made plain by the provisions of Section 427 of the *California Code of Civil Procedure*, which provides that:

“The plaintiff may unite several causes of action in the same complaint, where they all arise out of:
* * * Claims against a trustee by virtue of a contract or by operation of law; * * * The causes of action so united * * * must be separately stated
* * *.”

If separate and distinct transactions became a “general wrong” because perpetrated by “delinquent trustees,” there would be no reason for the foregoing provision of Section 427 of the Code of Civil Procedure.

Clearly there were five claims founded on separate transactions within the meaning of Rule 10(b). The cases decided under this rule amply sustain the ruling of the District Court in this regard:

Kuhn v. The Pacific Mutual Life Insurance Company of California (D. C. N. Y.), 37 F. Supp. 100 (“* * * several causes of action to recover divers sums, predicated upon different circumstances”);

Conner v. Southern Ry. Co. (D. C. Tenn.), 1 F. R. D. 410 (commingling of common law and statutory grounds);

- Chambers v. National Battery Co.* (D. C. Mo.), 34 F. Supp. 834 (action for libel and slander; under local practice the judge determines the law on one, and the jury the law on the other);
- American Foman Co. v. United Dye Wood Corp.* (D. C. N. Y.), 1 F. R. D. 171 (action for patent infringement, damages for unlawful appropriation of invention, and other relief);
- Ingenuities Corporation of America v. Trau* (D. C. N. Y.), 1 F. R. D. 578 (action based on unfair competition, unfair trade practices, fraud, deceit, conspiracy, infringement, violation of trade marks and violation of license contracts);
- Bicknell v. Lloyd-Smith* (D. C. N. Y.), 25 F. Supp. 657 (action by two plaintiffs severally holding corporate bonds to recover upon a contract of guaranty by defendants. The court said that the answer as to one plaintiff might be different from the answer to the other).

Appellant further contends that the charges of a continuing conspiracy [pars. XIX and XX, R. 150-156] result in a single cause of action (Br. pp. 109-110).

The contention here made by appellant is similar to that made by the plaintiff in *Bowman v. Wohlke*, *supra*, 166 Cal. 121, 135 Pac. 37, and overruled by the Supreme Court of California. In the case cited:

“the plaintiffs, after alleging that defendants conspired to do the acts complained of for the purpose of destroying the business of plaintiffs and of holding them up to contempt and obloquy, and exposing them to public hatred, contempt, and ridicule, alleged a series of acts on their part in pursuance of said conspiracy, * * *

166 Cal. 122-123.

Defendants demurred specially upon the ground that "causes of action united in the complaint were not separately stated" (166 Cal. 127). The trial court overruled this demurrer and the case went to trial, resulting in a judgment for the plaintiffs for \$400.00 actual damages and \$3,000.00 exemplary damages. In its opinion reversing the judgment the Supreme Court thus states the theory upon which the plaintiffs attempted to sustain the judgment:

"The theory of counsel for plaintiffs is that by reason of the claim that all the acts were done in pursuance of a conspiracy, we have but a single cause of action stated in the complaint, a cause of action for damages for 'conspiracy,' and that any variety of wrongful acts, whether ordinarily capable of being united in a single action or not, may be so united if done in pursuance of a conspiracy." 166 Cal. 124.

The California Supreme Court, after examining and quoting from many authorities, including the case of *Green v. Davies*, 182 N. Y. 503, 75 N. E. 536, concluded that,

"The complaint alleged various causes of action for different torts, all committed, it is true, in pursuance of a single conspiracy, but each, nevertheless, giving rise to a separate cause of action for the injury caused by the particular wrongful act." 166 Cal. 126.

The language of the decision is so illuminating and in point that we quote it at length therefrom in the Appendix (pp. 3-6).

Appellant attempts to distinguish the case of *Bowman v. Wohlke*, *supra*, by saying that it is "strictly a common law action" (Br. p. 109). But as we have already shown, this remark is predicated upon the erroneous assumption

that because appellant is perforce in equity her position is different from that which would have been the case had Transamerica or its subsidiaries brought the action (*ante*, pp. 39-40).

Appellant cites a number of Federal cases involving criminal conspiracies in support of her contention that the directors who ceased to hold office did not thereby withdraw from the conspiracy (Br. pp. 103-106). She asserts that these decisions demonstrate that one may continue to be a conspirator "after his power to commit a corporate act is taken from him" (Br. p. 109). It will be unnecessary to examine these cases. As stated, each involved a criminal conspiracy in which the unlawful combination and confederacy is the gist of the offense (*Bowman v. Wohlke*, *supra*, quoted in Appendix, p. 4). In none of the cases cited by appellant was the *ability* of the defendants to continue to aid and abet the conspiracy dependent upon their retaining an official position. Moreover, even if a continuing conspiracy of all the directors has been sufficiently alleged, this would not convert five different claims into a single cause of action.

As the language quoted in the Appendix (p. 4) from *Bowman v. Wohlke*, *supra*, demonstrates, the allegations of conspiracy add nothing to the complaint.

"The averment of a conspiracy is immaterial, and could be proved without such averment, or, if averred, need not be proved."

Bowman v. Wohlke, *supra*, 166 Cal. 125, quoting from

More v. Finger, 128 Cal. 313, 60 Pac. 933.

The importance of the allegations of conspiracy is to connect a defendant with a transaction and charge him

with the acts and declarations of his co-conspirators (*Bowman v. Wohlke*, 166 Cal. 126).

Appellant's new "legal theory" [R. 479] (and see opinion below [R. 328]) furnished no justification for her refusal to obey the direction of the court.

**Separate Statements of Each of
the Five Claims Would Facilitate
the Clear Presentation of the
Matters Set Forth.**

Rule 10(b) requires a statement in separate counts of claims founded on separate transactions "whenever a separation facilitates the clear presentation of the matters set forth."

It appears from the language of this rule that the question as to whether a separation facilitates a clear presentation is one largely within the discretion of the trial judge, to whom the presentation is made, and that in the absence of a clear abuse of discretion the ruling of the trial judge should not be annulled on appeal.

At the hearing of the motions directed at the Second Amended Complaint, the trial court remarked that

"* * * the points which were raised in opposition could more clearly be considered and determined if in further amending the bill these controversies which were described in the first amended bill were pleaded separately, * * *" [R. 477].

In the afternoon of the same day, the court, speaking to counsel for appellant, said:

"It would make our discussion and our consideration of the questions clearer if you had made the segregation as you indicated that you would" [R. 480].

In its written opinion the District Court declared:

“Hence we conclude that each claim founded upon a separate transaction, as hereinbefore outlined, should have been stated in a separate count, and that such separation would have facilitated the clear presentation of the matters set forth. (See Rule 10b, FRCP.)” [R. 355.]

When the trial judge reached this conclusion he had already listened to four days of oral argument and had before him voluminous briefs filed both before and after the last oral argument [R. 449]. His determination therefore is analogous to a finding of fact, which under Rule 52(a) “shall not be set aside unless clearly erroneous.”

We suggest very briefly a number of reasons supporting the court’s conclusion.

1. Preliminarily it should be observed that, for reasons already stated, a separation into counts would not have been detrimental to appellant or to Transamerica. Such a separation would not have diminished or impaired the total amount for which it might be shown Transamerica was entitled to recover, for damages were separately alleged for each transaction. A separation into counts would not foreclose appellant from proceeding upon her theory that all of the acts were done pursuant to a continuing conspiracy. Without the averment of a conspiracy appellant is entitled to relief in behalf of Transamerica for the alleged injuries from such of the appellees as she can show have united or cooperated in the wrongs complained of (*Bowman v. Wohlke*, 166 Cal. at 125, quoted Appendix, p. 4).

2. The right of Transamerica to recover on appellant's suit involves *different legal principles* in the different transactions. The legal questions involved in the first transaction appear from the face of the Second Amended Complaint to be entirely different from the principles involved in the other transactions. Again the liability of the directors for alleged waste of corporate funds (the fifth transaction) involves legal principles entirely different from the alleged diverting of profitable business in the second transaction. The question whether the third transaction (Pacific Coast Mortgage Company) and the fourth transaction (Mallory-Smith Syndicate) were sufficiently pleaded in the original complaint, and if not whether the statute has run against these causes of action, is a matter which is not involved in the other three transactions.

3. A consideration of the sufficiency of the allegations to state a claim upon the first transaction would not be relevant to a consideration of the allegations as to whether a claim was stated in the second, and the same is true as to each of the claims. A statement of the claims in separate counts would have afforded defendants an opportunity to test in an orderly manner the sufficiency of each count as to each defendant. The trial court which had before it the voluminous briefs and heard the oral arguments so decided [R. 477].

4. The *evidence* tending to prove the claims as alleged would be different in each transaction. For example, evidence which might tend to prove the so-called fraudulent salary agreement or the alleged wrongs committed in carrying out the provisions thereof would not tend to prove any of the remaining transactions. The District Court pointed this out [R. 354-355]. Counsel for appel-

lant criticize this language (Br. pp. 110-111) asserting that the court predetermined the evidence. But this is not a just or valid criticism. The court did not predetermine any evidence; it properly assumed that the evidence offered by appellant at the trial would be within the issues tendered by her Second Amended Complaint. From the allegations of the Second Amended Complaint it is apparent that even if the evidence tended to prove a general conspiracy, nevertheless evidence tending to prove overt acts connected with one transaction would have no tendency to prove any other separate and distinct transactions.

Moreover, it has been held that affidavits may be submitted by the defendants to aid the court in determining whether a separate statement of claims would facilitate a clear presentation thereof (*Bicknell v. Lloyd-Smith* (D. C. N. Y.), 25 F. Supp. 657, 658). Affidavits submitted by appellees disclose evidence available as a defense to the claim founded upon the salary agreement which is not relevant to the claims on the other four transactions.¹⁵

In Point III about to follow we contend that each claim is barred by the statute of limitations and that appellant has not sufficiently excused her delay as to any of them (*post*, pp. 58 *et seq.*). The trial court so held [R. 358]. While we are convinced of the correctness of this conten-

¹⁵[R. 79-80], affidavit showing the pendency in the Superior Court of Los Angeles County of the case of *Breakstone v. Giannini* to recover on the salary agreement; [R. 271-281], affidavit of Hector Campana, that at the direction of the officers of Transamerica he sent to all stockholders of Transamerica a letter dated December 9, 1931 [R. 274-281]. This letter on its face disclosed credits of \$3,700,000.00 to A. P. Giannini under the salary agreement and the withdrawal by him of all except \$792,000.00 thereof [R. 275-276].

tion and of the ruling of the trial court sustaining it, nevertheless to meet the contingency that would arise in event this court concluded otherwise and held that although certain of the claims are barred others are not, we desire here to point out that such determination would emphasize the correctness of the ruling of the trial court requiring a separate statement of the various claims for, without such separate statement, a just, speedy and inexpensive determination of these claims and each one thereof, as required by Rule 1, would be impracticable if not impossible of accomplishment. That the judge of the trial court entertained this thought is manifest from his statement:

“In other words, you will have done it both the way you now think it ought to be done and the way, at least, I think it is necessary to segregate it; and that will afford an opportunity to the other side to make separate and distinct attacks upon [the] several counts in the bill.” [R. 470-471.]

The Second Amended Complaint incorporated five claims in a single count, contrary to the order of the court and the agreement of counsel for appellant. A separate statement would have facilitated a clear presentation of the matters set forth. Appellant's excuses for failing to state the claims separately, namely, that the action is a single cause of action for an accounting and that the alleged continuing conspiracy results in the statement of but a single claim, have been shown to be untenable. The order of the trial court directing separate statements was proper. Appellant's failure to comply and/or to apply within the time limited for leave to file a third amended complaint furnishes ample ground for support of the judgment of dismissal.

III.

The Second Amended Complaint Fails to State a Claim Because, Among Other Reasons, It Clearly Appears on the Face Thereof That Each and Every Cause of Action Attempted to be Set Forth Therein Is Barred by the Statute of Limitations.
(Answering Appellant's Part Two, Br. pp. 69-87.)

In support of their motion to dismiss for failure to state a claim, appellees urged that the alleged causes of action were barred by the statute of limitations and laches, and that appellant had not alleged sufficient facts to toll the statute.¹⁶

In its Memorandum Opinion the Court stated:

“In the light of the allegations and admissions in her pleading, and in view of the circumstances and conditions to which attention previously has been directed, we are persuaded that * * * before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint.” [R. 358.]

Appellant contends that since, under Rule 8(c), it is provided that laches and the statute of limitations must be affirmatively set forth as a defense, a motion to dismiss under Rule 12(b) is not proper, and cites *Dirk Ter Haar*

¹⁶The record references to the motions to dismiss are as follows: A. P. Giannini, grounds (b) and (c) [R. 194]; L. M. Giannini, *et al.*, grounds 3 and 4 [R. 218-219]; Bank of America, etc., as Administrator, ground (4) [R. 239]; A. H. Giannini, *et al.*, grounds (b) and (c) [R. 256]; Elkus, *et al.*, grounds (1) and (2) [R. 284]; White, grounds (b) and (c) [R. 296-297]. The record references to the motions for a more definite statement are given later in the argument.

v. Seaboard Oil Company, 1 F. R. D. 598 (Br. p. 84). But the weight of authority is to the effect that where the bar of the statute appears from the face of the pleading, a motion to dismiss will lie.

Abram v. San Joaquin Cotton Oil Co. (D. C. S. D. Cal.), 46 F. Supp. 969, elaborately discussing the question at pp. 974-975;

A. G. Reeves Steel Const. Co. v. Weiss (C. C. A. 6), 119 F. (2d) 472, 476;

Wright v. Bankers Service Corporation, 39 Fed. Supp. 980;

Cramer v. Aluminum Cooking Utensil Company, 1 F. R. D. 741;

Barnhart v. Western Maryland Ry. Co., 5 Fed. Rules Service 103;

Pearson v. O'Connor, 5 Fed. Rules Service 104.

See also the discussion of this point by the editors of the Federal Rules Service, 671, which concludes as follows:

“If the bar appears on the face of the complaint, it may be raised either by motion or in the answer; if not, it will normally be pleaded affirmatively.”

In a stockholder's derivative suit, if the statute has run against the corporation, neither the corporation nor any stockholder may maintain the action.

Cwerdinski v. Bent, *supra*, 256 App. Div. 612, 11 N. Y. S. (2d) 208, affirmed without opinion, 281 N. Y. 782, 24 N. E. 475;

Wallace v. Lincoln Savings Bank, *supra*, 89 Tenn. 630, 15 S. W. 448. (Both quoted, *ante*, p. 40.)

If the statute has run against the plaintiff in such a suit, then the plaintiff may not maintain the action, although other stockholders may not be similarly barred.

Fleishhacker v. Blum (C. C. A. 9), 109 F. (2d) 543, 548, footnote 8.

The complaint shows on its face that each of the alleged causes of action is barred either as against the corporation, Transamerica, or against appellant as a stockholder thereof, with the result that the action may not be maintained.¹⁷

The applicable statute is Section 338, subdivision 4, of the California Code of Civil Procedure, as has recently been held by this Court in *Fleishhacker v. Blum, supra*, 109 Fed. (2d) 543, where it is stated:

“The applicable statute (Cal. Code of Civil Proc., Sec. 338, sub. 4) provides that an action for relief on the ground of fraud or mistake must be brought within three years, but that ‘the cause of action in such case (is) not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.’ ”

To the same effect see:

Pourroy v. Gardner, 122 Cal. App. 521, 10 Pac. (2d) 815.

Appellant has cited no California case, and no case outside of California involving a stockholder's derivative action, to the contrary. Appellant does contend that since

¹⁷Obviously if it should be held that any of the five alleged causes of action is not barred, but such alleged cause of action fails to state a claim the same result must follow. The failure of each alleged cause of action to state a claim is discussed in Point V, *post*.

Transamerica is a Delaware corporation (Br. p. 6), the statute of limitations and the doctrine of laches of the State of Delaware are controlling under the decision in *Erie R. R. Company v. Tompkins*, 304 U. S. 64 (Br. p. 81). But this contention is untenable under the ruling in *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 496, wherein the United States Supreme Court stated:

“* * * the prohibition declared in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, against such independent determinations by the federal courts, extends to the field of conflict of laws.”

The Supreme Court of California has stated on this subject:

“It is a principle of conflict of laws recognized in California that the barring of a claim by the statute of limitations is a procedural matter governed by law of the forum, regardless of where the cause of action arose.” (Citing cases.)

Biewend v. Biewend, 17 Cal. (2d) 108, 114, 109 Pac. (2d) 701.

An analysis of the allegations of the Second Amended Complaint will demonstrate:

1. That if any cause of action in favor of Transamerica arose from any of the five transactions set forth in said complaint, such cause of action accrued more than three years before the commencement of the action; and
2. That the Second Amended Complaint does not allege sufficient facts to excuse the failure to commence this action within the said period of three years.

We will discuss these matters in the order stated.

If Any of the Five Transactions Gave
Rise to a Cause of Action, Such Cause
of Action Arose More Than Three Years
Before This Action Was Filed.

The five transactions were:

1. The salary agreement transaction.
2. The Walston & Co. transaction.
3. The Pacific Mortgage transaction.
4. The Mallory-Smith Syndicate transaction; and
5. The Market transaction.

(For a brief statement of each of these transactions, as set forth in the First Amended Complaint, see pages 8 and 9 hereof; and as set forth in the Second Amended Complaint, together with the applicable references to the transcript, see page 16 hereof.)

According to the Second Amended Complaint, the Smith-Mallory transaction was complete in 1936, and the market transaction was entirely ended in 1937. Since this action was not commenced until April 16, 1941, it is obvious that it was commenced after the three-year period had expired, in so far as these transactions are concerned.

The allegations concerning the salary agreement are found in paragraphs XXVI to XXVIII [R. 162-168]. In so far as pertinent to the present discussion, it appears that prior to January, 1927, A. P. Giannini entered into a salary agreement with Bancitaly Corporation in and by which he was to receive five per cent of the net profits of said corporation in lieu of salary [R. 163]. Pursuant to said agreement there were credited on the books of Bancitaly Corporation sums aggregating approximately \$925,000.00 [R. 163]. On the 25th day of May, 1929,

the Board of Directors of Transamerica Corporation assumed the obligations of Bancitaly Corporation, including the liability under the salary contract [R. 162]. During the period from about the 5th day of April, 1929, to the first day of January, 1930, substantial credits were made pursuant to said contract, aggregating not less than \$3,700,000.00, upon the books of Transamerica Corporation [R. 165]. During a period commencing on or about the 5th day of April, 1929, the amounts of said credits were from time to time paid, the times of said payments being unknown to plaintiff, except with respect to a sum of approximately \$1,271,647.01, which was paid in unequal annual instalments commencing in the year 1930 and ending in the year 1939, the payment in the year 1939 amounting to \$13,346.28, and the payment in the year 1938 amounting to \$34,000.00 [R. 167]. The damage alleged to have been suffered by reason of these transactions was a sum not less than \$3,700,000.00 [R. 168].

If we were to concede that the allegations of appellant's complaint were sufficient to establish that the assumption of the agreement by Transamerica constituted a fraud, obviously the cause of action in favor of Transamerica accrued at the time of the assumption of said contract, and the making of the entries with regard thereto on the books of Transamerica. In such circumstances, Transamerica would have had the right to seek relief from the transaction and the results thereof. Appellant may argue that since some of the payments pursuant to such entries were made in 1938 and 1939, the cause of action did not accrue with regard to this transaction until the last payment had been made. This contention is unsound, as is demonstrated by the cases hereinafter cited. The gravamen of

appellant's cause of action on this count is the assumption by Transamerica of the alleged fraudulent salary agreement and the credit given on the books of Transamerica, and if appellant has a cause of action it arose and was complete upon such assumption and credit. The payments subsequently made were merely evidence of the damage arising from the fraudulent act. These damages could have been estimated prospectively. In this case the statute of limitations began to run either at the time of the perpetration of the alleged fraud or at the time of the discovery.

See:

Thayer v. Kansas Loan Co. (8th C. C. A.), 100 Fed. 901.

In that case, the plaintiff had purchased from the defendants certain mortgages upon fraudulent representations that the mortgagors were solvent, and that the mortgaged property was worth much more than the debts secured thereby. The defendant pleaded the bar of the statute of limitations. The plaintiff claimed that the limitation did not commence to run until the mortgages were foreclosed and the loss occasioned by the fraud was ascertained. In answer to this contention of the plaintiff, the Circuit Court of Appeals says at pages 903-904:

“The learned counsel for the plaintiff in error ingeniously claims that, as a false affirmation made by the party with intent to defraud the plaintiff is not actionable unless the plaintiff received or suffered damages thereby, the statute of limitations did not begin to run until after the foreclosure proceedings by the plaintiff had been concluded, and a sale of the premises made, as until then he could not tell what his damages, if any, would be by reason of the deceit

and fraud of the defendants. While it is true that no action for deceit will lie unless the party defrauded has been damaged thereby, yet it does not follow that the amount of damages must first be ascertained by judicial proceedings, before the statute of limitations is set in motion. We are, in effect, asked by the learned counsel for the plaintiff in error to add to the statute so as to make it read:

‘The cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud and the ascertainment by the plaintiff of the loss sustained by him by reason of the transaction.’

Courts are compelled to indulge in a good deal of judicial legislation, but it is never done to the extent and in the manner here suggested. It is commonly confined to cases of first impression, and does not invade fields already fully covered by express legislative enactment. *The contention that the statute begins to run, not from the discovery of the fraud, but from the judicial ascertainment of the amount of the loss sustained by the fraud, is not tenable. Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537, 32 L. Ed. 953; *Jones v. Lemon*, 26 W. Va. 629; *Bennett v. Worthington*, 24 Ark. 487; *Murray v. Railway Co.*, *supra*. The plaintiff’s causes of action set forth in all the counts except the second are clearly barred by the statute of limitations.”

See also:

Agee v. Virden Packing Co., 15 Cal. App. (2d) 691, 694, 59 P. (2d) 1058,

where the Court said:

“The contention plaintiffs make in support of their appeal is that in cases of fraud the cause of action

accrues at the time of rescission and not at the time of the discovery of the fraud; and that consequently since the action herein was commenced only ten days after rescission, it was not barred by the statute. Such, however, is not the law. Both by statute and judicial decision it has been long since declared that a cause of action for fraud accrues immediately upon the discovery of the facts constituting the fraud (subd. 4, sec. 338, Code Civ. Proc. * * *).

Greenberg v. Du Bain Realty Corp., 27 Cal. App. (2d) 111, 116-117, 80 P. (2d) 537;

Sanders v. Sanders, 117 Cal. App. 231, 234, 3 P. (2d) 599;

Bradbury v. Higginson, 167 Cal. 553, 557-558, 140 Pac. 254;

Note 110 A. L. R. 1178.

Clearly, the consummation of the alleged fraud arising out of the salary agreement was complete at the time the entries were made and at that time a cause of action arose. The Second Amended Complaint alleges that:

“During the period of time commencing on or about the 5th day of April, 1929, and ending on or about the first day of January, 1930 * * * said defendants and persons * * * caused said defendant and its corporate subsidiaries, departments and instrumentalities, to make and enter certain purported, false, fraudulent and fictitious, credit entries in favor of the defendants, Amadeo P. Giannini and L. M. Giannini, and the aforesaid Virgil D. Giannini (now deceased), in substantial sums aggregating not less than Three Million, Seven Hundred Thousand Dollars (\$3,700,000.00) upon the corporate records

and books of account of said defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, as purported liabilities thereof * * *.”

Thus it appears that this action, commenced on April 16, 1941, was commenced long after the three-year period had expired, because the entries of the credits were complete by January 1, 1930, eleven years before this action was commenced.

The allegations respecting the Walston & Company transaction are that this company was formed on December 17, 1932, when Transamerica and its subsidiaries were actively engaged in a profitable investment and brokerage business [Par. XXX, R. 169-170]. Payments are alleged to have been made to Walston & Company in the years 1933 to 1938 [R. 171-172]. The theory of this cause of action appears to be that profitable business of Transamerica and its subsidiaries was transferred to Walston & Company. The business was transferred or diverted late in 1932 or early in 1933 [R. 169-170], and the three-year statute has run against this transfer. The “substantial, profitable investment, security and brokerage business” [R. 169] of Transamerica and its subsidiaries necessarily had ceased to exist before 1938. When the statute ran against this transfer of business, all right of Transamerica or stockholders acting in its behalf to recover brokerage payments was cut off. Thenceforward the situation is no different from any case where a corporation hires a brokerage firm to act as its securities broker. Since prior to 1938 the statute had run against the transfer of business, the mere fact that in 1938 some part of the brokerage fees was alleged to have been paid

does not give rise to a cause of action. There are no allegations that the fees were exorbitant or anything more than the charges usually made for brokerage services.

The allegations that sums were also advanced to Walston & Company for use as capital "and other purposes" [R. 172] is too general to state a claim. The payment of these sums have no apparent relation to the alleged transfer of business, which is the foundation of plaintiff's claim. No reference is made to the payment of these sums in Paragraph XXXIII [R. 173] in which the concealment of the earnings and profits of Walston & Company is alleged.

In respect to the third transaction recovery of profits of the Pacific Coast Mortgage Company (formerly Bankitaly Mortgage Company) it is alleged that the profits sought to be recovered "were earned and collected" during the years 1933 to 1938 [R. 176-177]. The foundation of this claim is that in 1932 Transamerica and its subsidiaries advanced moneys to defendants to purchase Bankitaly Mortgage Company, a subsidiary of Transamerica, and also moneys to enable Bankitaly Mortgage Company (Pacific Coast Mortgage Company) to engage in stock speculation [R. 174-175]. Assuming that said payments and advances and the acquirement of the mortgage company were "without legal right or authority" [R. 174-175] the statute has run against this transaction. Before 1938 (the last year in which profits were earned and collected by the mortgage company for which recovery is here sought) the right of Transamerica and its stockholders to complain of the 1932 transactions had become barred by the statute of limitations. The unqualified ownership of the mortgage company became vested in its stockholders free of any claim on the part of Transamerica or

its stockholders. The profits earned and collected in 1938 were but incidents of this ownership and any right to recover these profits is likewise barred. (Cal. Civ. Code, Section 3540.)

At most the defendants became no more than constructive trustees of the mortgage company in 1932 and the statute began to run immediately.

Bainbridge v. Stoner, 16 Cal. (2d) 423, 429, 106 P. (2d) 423;

Bell v. Bayly Bros., Inc., 53 Cal. App. (2d) 149, 158-159, 127 P. (2d) 662.

It therefore appears that each of the five actions set forth in the Second Amended Complaint occurred more than three years prior to the commencement of the action.

**The Second Amended Complaint
Does Not Allege Sufficient Facts
to Excuse the Failure to Commence
This Action Within the Statutory
Period of Three Years.**

It is well established that where an action based upon fraud is brought more than three years after the occurrence of the alleged facts constituting the fraud, as is the case here, it is incumbent upon the plaintiff to allege *with particularity*

“when it [the discovery] was made, what it was, how it was made, and why it was not made sooner.”

Wood v. Carpenter, 101 U. S. 134, 140-141.

The California cases are in accord:

Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 702, 703, 16 Pac. (2d) 268;

Lady Washington C. Co. v. Wood, 113 Cal. 482, 486, 487, 45 Pac. 809;

Haley v. Santa Fe Land & Improvement Co., 5 Cal. App. (2d) 415, 420-421, 42 P. (2d) 1078 (hearing by Supreme Court denied).

In the case last cited the defendant interposed a general demurrer based on the statute of limitations and a special demurrer for uncertainty in respect to the allegations designed to avoid the bar of the statute (5 Cal. App. (2d) 419-420). The trial court overruled the demurrers. A trial was had resulting in a judgment in plaintiff's favor for \$18,000. A new trial was denied and the defendant appealed. The District Court of Appeal, expressly recognizing the California rule (C. C. P. Sec. 452—similar to Rule 8(f)) that the "allegations [of a pleading] must be liberally construed, with a view to substantial justice between the parties" (5 Cal. App. (2d) 424) nevertheless reversed the judgment upon the ground that the trial court erred in overruling the general and special demurrer. The rules are succinctly stated, and we quote from the case:

"A party seeking to avoid the bar of the statute must aver and show that he used due diligence to detect the fraud; and if he had the means of discovery in his power he will be held to have known it. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite reasonable diligence. (*Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698 [16 Pac. (2d) 268].) He must *set forth the times and circumstances under which the facts constituting the fraud came to his knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within*

that period. (Galusha v. Fraser, 178 Cal. 653, 547 [174 Pac. 311].) ‘Discovery’ and ‘knowledge’ are not convertible terms; and whether there has been a proper allegation as to a ‘discovery’ of the facts ‘constituting the fraud’ within the meaning of the statute of limitations is a question of law to be determined by the court from the facts pleaded. (Lady Washington Consol. Co. v. Wood, 113 Cal. 482 [45 Pac. 809].)”

The portion of this quotation which we have italicized also appears verbatim in *Consolidated R. & P. Co. v. Scarborough*, *supra*, 216 Cal. 703.

It will be observed that under the foregoing authorities there were imposed on appellant certain specific burdens, as follows: (1) to negative means of discovery; (2) affirmatively to show due diligence and that the delay was consistent with requisite reasonable diligence, and (3) a full statement of the circumstances of the discovery and of the times and circumstances under which the facts constituting the alleged fraud came to her knowledge.

Appellant has made a number of allegations in her Second Amended Complaint apparently designed to meet each of these burdens. The allegations are scattered and are somewhat repetitious. Without detailing them here, we give record references arranged according to each of the burdens above stated:

(1) Allegations to negative means of discovery: Transamerica’s books were intricate and involved and beyond comprehension of appellant [par. XXIX, R. 168-169]; and certain matters were concealed from or camouflaged on the books of Transamerica and its subsidiaries [par. XXIX, R. 169; par. XXXIII, R. 173; second subparagraph of par. XXXV, R. 176; second sub-

paragraph of par. XXXVII, R. 178-179; par. XL, R. 182-183].

(2) Allegations to show that appellant used diligence and that her delay was consistent with the requisite reasonable diligence: Until discovery April 27, 1939, she was ignorant and lacked information [par. XLI, R. 183], had full confidence in integrity of directors [par. XLI, R. 184], and no reason to suspect directors of wrongdoing [R. 185].

(3) Facts and circumstances of discovery: the order of Securities and Exchange Commission dated November 22, 1938, released under date of November 25, 1938, was called to appellant's attention on April 27, 1939, when for the first time she ascertained the facts contained in said order [R. 184-185]; thereupon she began to investigate and has diligently continued the investigation but has been unable to fully complete such investigation, and is still proceeding therewith [R. 186]. The order of the Commission was expressly referred to in the Second Amended Complaint [R. 185], was served on appellees [R. 446-447] and filed [R. 447], and appears in the record herein [R. 417 *et seq.*]. The order was thus incorporated by reference and was brought to the court's "attention by proper pleading" (*Hewitt v. Great Western Beet Sugar Co.* (C. C. A. 9), 230 Fed. 394, 398).

These allegations fall far short of alleging with particularity the requirements of *Wood v. Carpenter*, *supra*, and the California cases in accord.

1. The allegation that the books of Transamerica and its subsidiaries were kept in an involved system beyond the knowledge and understanding of appellant [R. 168-169] is irrelevant. Under Section 355 of the California

Civil Code, appellant had the right to inspect Transamerica's books of account "by agent or attorney" and the right to make extracts.

There are no allegations that the credits to A. P. Giannini under the salary agreement were concealed. On the contrary, appellant's complaint is that Transamerica and its subsidiaries were caused to make certain "credit entries" in favor of the Gianninis in sums aggregating not less than \$3,700,000.00 "upon the corporate records and books of account of said defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities * * *" [R. 165]. Apparently appellant had no difficulty in understanding Transamerica's method of bookkeeping with respect to this substantial item. Appellant's allegation is an implied admission that there was no concealment of the entries made under the salary agreement.

The allegation of paragraph XXXIII of the Second Amended Complaint that the interests of the defendants in Walston & Co. and the division of its profits were withheld from the books of Transamerica and its subsidiaries [R. 173] entirely misses the mark. Such entries would have no proper place in the books of Transamerica or its subsidiaries. There is a conspicuous absence of allegations that the brokerage fees paid and money advanced to Walston & Co. were withheld from the books of Transamerica or its subsidiaries. If, as the appellant alleges, Transamerica and its subsidiaries were actively engaged in 1932 in a brokerage business [R. 169], as a stockholder she was charged with notice of that fact.

Appellant, however, contends that a stockholder cannot be presumed to know facts appearing in the records and

books of the corporation and that failure to acquire knowledge of the wrongful acts of the corporate officers is not negligence, citing *Cahall v. Lofland*, 12 Del. Ch. 299, 305, 114 Atl. 224 (Br. pp. 81-82), *Cahall v. Burbage*, 13 Del. Ch. 299, 303, 119 Atl. 574 (Br. p. 82). These contentions are subject to the exception announced by the California District Court of Appeal in *Pourroy v. Gardner*, *supra*, 122 Cal. App. 521, 10 Pac. (2d) 815 (a stockholder's action). The court there said, at page 532:

"True, no duty rests upon stockholders to examine the books or minutes of the corporation, either constantly or at intervals, for the purpose of detecting illegal or fraudulent transactions committed against the corporation or its directors (*Reid v. Robinson*, 64 Cal. App. 46 [220 Pac. 676]); nevertheless where the circumstances are such as to put a person of ordinary intelligence and prudence on inquiry, or where there are gross laches in not making any effort to discover the real facts which might have been discovered by the use of slight diligence, the statute of limitations cannot be avoided, and the knowledge which thus might have been obtained is imputed as of the time of the commission of the fraud. [Citing cases.]"

The complaint alleges that in 1931 and 1932 two extraordinary changes occurred in the personnel of the board that should have excited appellant's interest and resulted, with the use of slight diligence, in the discovery of facts now complained of.

2. Appellant's allegation that she had no knowledge is a defensive allegation. Although the statute would have immediately commenced to run, if appellant had knowledge, her allegations of lack of knowledge of the

facts or of suspicious circumstances do not show the absence of a discovery. Appellant's allegations that until discovery she had full and complete confidence in the integrity and good faith of the directors and officers of Transamerica and its subsidiaries overlooks the fact that many of the defendants had ceased to be directors of Transamerica many years before the alleged discovery was made [R. 158-161], others such as most of the Wals-ton partners were strangers to Transamerica.

3. Appellant's allegations respecting her discovery are wholly insufficient. She alleged that on April 27, 1939, the proceeding before the Securities and Exchange Commission was called to her attention and that she "then and there and for the first time, ascertained the matters, facts, things, circumstances and charges contained in said order for hearing which had been released under date of November 25, 1938" [R. 184-185]. A printed official copy of said order was tendered for filing "for the purpose of showing the nature and extent of plaintiff's first discovery of suspicious circumstances concerning the wrongs of which complaint is made herein" [R. 185]. An examination of said order [R. 417 *et seq.*] discloses that it touched upon two matters, and only two matters, at all relevant to the charges contained in the Second Amended Complaint, viz.:

First. The order recited the Commission's belief that a credit had been entered in A. P. Giannini's favor on the books of a Transamerica subsidiary in 1930 in the amount of \$1,400,000.00; that of this sum all but \$792,000.00 had been paid Mr. Giannini by September, 1931, at which time counsel for the then existing management advised that further payment would be illegal; that subsequent to the change of management in 1932,

and in the years 1932 to 1936, inclusive, A. P. Giannini withdrew certain specified sums from said balance [R. 419-420]. The order further recited that it appeared to the Commission that failure to disclose those payments in the items calling for information with respect to remuneration paid to officers rendered said items materially misleading [R. 419-420].

Second. That corporate funds, expended in soliciting purchases of Transamerica stock, had been charged to Paid-In Surplus instead of to profit and loss, and that Transamerica's failure to reflect this item as a current expense with consequent reduction in Earned Surplus rendered both the balance sheet and the profit and loss statement of Transamerica materially misleading [R. 420-422].

There was no suggestion in the order that the credits to A. P. Giannini or the expenditures of funds were the result of a conspiracy. There was no intimation that the salary agreement was illegally assumed by Transamerica or its subsidiaries, or that payments thereunder were computed upon false, fictitious or inflated profits.

There was no suggestion in the order that the disbursements for the purpose of soliciting orders for the purchase of its capital stock held by Transamerica were unlawful or fraudulent. On the contrary the Commission's position was that the disbursements represented a "current expense *properly* chargeable to profit and loss" [R. 421].

There was nothing in said order in respect to the other three transactions, namely, the second *i.e.* Walston & Company transaction, the third *i.e.* Pacific Coast Mortgage

Company transaction, and the fourth *i.e.* Mallory-Smith transaction.

Appellant alleges that after reading the order she caused an investigation to be made which was still progressing [R. 186].

Assuming, as claimed by appellant, that she has alleged "discovery of suspicious circumstances with respect to wrongdoing by the corporate management" (Br. p. 86), nowhere in her Second Amended Complaint does appellant allege the discovery of the particular acts of wrongdoing upon which her complaint is based. She does not allege "the times and circumstances under which the *facts constituting the fraud* came to [her] knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within that period" (*Consolidated R. & P. Co. v. Scarborough, supra*, 216 Cal. 703; *Haley v. Santa Fe, etc. Co., supra*, 5 Cal. App. (2d) 420-421).

In arguing another point (Part One, Br. p. 67) appellant asserts that "it can reasonably be assumed" that she discovered the very facts and circumstances related in the pleading from the investigation made after her suspicions were aroused. The complete answer is that she did not make any such allegation in her Second Amended Complaint, nor did she state facts therein from which the court could determine whether the matters discovered as a result of such investigation could not reasonably have been learned at an earlier date. Although these defects in the Second Amended Complaint were plainly pointed out by the court, appellant did not apply for leave to file a third amended complaint containing the necessary allegations.

The District Court recognized that the only allegations of the facts and circumstances of discovery related to the matters contained in the order of the Securities and Exchange Commission and that unless said order contained recitals supporting appellant's charges of fraud, then there was no allegation of the times and circumstances under which the facts constituting the fraud came to appellant's knowledge. Accordingly, the court for the purpose of determining the nature and extent of appellant's discovery [see par. XLI, R. 185], examined said order [R. 347-350], and came to the conclusion, which we have already demonstrated to be correct, that the said order "contains no recitals supporting the charges she has made herein" [R. 350-351]. The court properly held that "before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint [R. 358]."¹⁸

We have so far confined our discussion to a showing that appellant (as distinguished from Transamerica) is barred by the statute of limitations and laches. We now proceed to show that the action is barred as to Transamerica and therefore as to appellant.

In order to avoid the bar of the statute as to Transamerica, it was necessary for appellant to show that the corporation was under a disability which prevented the statute from running (*Whitten v. Dabney, supra*, 171 Cal. 621, 629, 154 Pac. 312) and that Transamerica had no

¹⁸A connected point, Appellant's Part Five (Br. pp. 112-120) namely, that the court in passing on the statute of limitations considered as proven certain matters dehors the second amended complaint, will be answered under Point VI, *post*.

knowledge of the acts complained of. This appellant sought to do by alleging that "said defendants and persons" had complete control of the voting power of Transamerica stock, elected all of the individual members of its directors and completely controlled, dominated, determined, and directed the entire business policies and affairs of Transamerica [par. XXI, R. 156-157]. Considered apart from the allegations of conspiracy shortly to be noticed, these allegations are insufficient. The following authorities, while deciding the insufficiency of similar allegations as an excuse for failing to make demand upon the Board of Directors, are in point:

13 *Fletcher, Cyc. Corporations* (Perm. Ed.), Sec. 6008, pp. 321-322; 1943 Rev. pp. 401-402;

Baillie v. Columbia Gold Mining Co., 86 Ore. 1, 166 Pac. 965, 971;

Starke v. Boggs, 289 Ill. App. 461, 7 N. E. (2d) 369, 371.

Compare also:

Texas Company of Mexico v. Roos (C. C. A. 5), 43 F. (2d) 1, 15 (certiorari denied 282 U. S. 902).

The District Court properly ruled herein:

"Again, and for similar reasons the defendants are entitled to have plaintiff disclose whether she claims that all of them and also all of said forty-four other persons listed as having served at one time or another as directors of Transamerica, or if only some then which of them, held and exercised control of all of the issued and outstanding voting shares of capital stock of Transamerica, and also to set forth the ultimate facts upon which she bases such con-

clusions. Likewise, these litigants should be informed whether the pleader asserts that all of the defendants and all of the aforementioned forty-four other persons, or if only some then which of them, elected and completely dominated and controlled the several boards of directors of the latter corporation, and also should be given the ultimate facts upon which she bases these conclusions.” [R. 359.]¹⁹

Appellant made allegations in paragraph XIX of the Second Amended Complaint [R. 150] which, when read in connection with the allegations of paragraphs XXII and XXIII [R. 157-161] listing the names of all the directors of Transamerica and paragraph XLII [R. 187], had the effect of alleging that every director of Transamerica from October 11, 1928 (the date of Transamerica's incorporation) was a member of this conspiracy. But in paragraphs XXIV and XXV [R. 161-162], she made alternative allegations the last of which was that such of the directors, if any, who were *not* members of the conspiracy or a puppet or dummy either failed to discover any of the wrongful acts or “on the other hand, having discovered the same, at all times thereafter, knowingly and in complete disregard of his official duties,

¹⁹These rulings were responsive to the following items in the several motions for more definite statement: A. P. Giannini, Item D3 [R. 210]; L. M. Giannini, *et al.*, Item 26 [R. 227-228]; Bank of America etc., as administrator, Items (12), (13), (14), (15) and (16) [R. 245]; A. H. Giannini, *et al.*, Items 4 and 5 [R. 262-263]; Elkus, *et al.*, Item (6) [R. 288]; White, Item 26 [R. 307].

wholly failed to take action to redress or prevent the continuance of such wrongs * * * [R. 162]. The effect of this allegation is an admission that some of the directors of Transamerica may not have been either conspirators or dummies, but nevertheless had knowledge of the matters complained of and merely may have failed to take action.

It is established that if one director who was not under the domination or control of the wrongdoers obtained knowledge of the transactions complained of, the statute of limitations begins to run, because the knowledge of such director is the knowledge of the corporation.

Curtis v. Connly (1921), 257 U. S. 260, 66 L. Ed. 222.

To the same effect see:

Farmer v. Standeven (1938), 93 F. (2d) 959;

Hughes v. Reed (1931), 46 F. (2d) 435;

Grussemeyer v. Harper (1936), 187 Wash. 508, 60 P. (2d) 702;

Van Schaick v. Aron (1938), 10 N. Y. S. (2d) 550, 562.

In *Curtis v. Connly*, *supra*, 257 U. S. 260, at 264, the court said:

“Even if otherwise the statute of limitations would not have run, which we do not imply, knowledge of the facts by the new directors was knowledge by the bank, and none the less that according to the bill they in their turn were unfaithful. It is not alleged that

they conspired with the defendants whose case we are considering. They came to the board as the eyes of the bank. Anyone of them having notice was bound to do what he could to avert or diminish the loss. Indeed the bill seeks to charge one of them for not having done his duty. Notice to an officer, in the line of his duty, was notice to the bank. A single director like a single stockholder could proceed in the courts. *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381, 403.”

The trial court herein properly ruled:

“In addition the litigants ought to be advised whether plaintiff asserts that each and all of the defendants, or if only some then which of them, had knowledge of the facts which she claims constitute the alleged frauds etc., complained of, also whether such knowledge was actual or constructive, and when it is contended such knowledge was acquired.” [R. 359-360.]²⁰

“Finally and upon similar grounds we believe that the defendants are entitled to have plaintiff state whether she claims that each and all of the defendants, or if only some then which of them, were conspirators, also which if any of the defendants were

²⁰This ruling is responsive to the following items in the several motions for a more definite statement: A. P. Giannini, Item F3 [R. 211-212]; A. H. Giannini, *et al.*, Item 8 [R. 263]; Elkus, *et al.*, Item (9) [R. 289]; White, Item 64 [R. 314]. The ruling dealt with averments affecting the time when the statute of limitations began to run and is supported by *Mendola v. Carborundum Co.* (D. C. N. Y.), 26 F. Supp. 359.

puppets but not conspirators, also which if any of them were neither conspirators nor puppets but failed to discover the alleged wrongful acts complained of, and which of the defendants though neither conspirators nor puppets discovered such alleged wrongful acts and failed to take action thereon.” [R. 359-360.]²¹

We assume that appellant claims the right to make these alternative allegations under clause (2) of Rule 8(e). This clause in terms purports to permit a party to set forth alternative “statements of a claim” and provides that “the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.”

It seems plain that this portion of Rule 8 has no application to a stockholder’s action, where the charges involve fraud which under Rule 9(b) “shall be stated with particularity,” and in which the complaint must be verified. (Rule 23(b).)

Rule 8(e) (2) is a general provision. Rule 23(b) is a special rule dealing with stockholder actions. Under familiar rules of interpretation the specific rules control over the general, and the entire subject matter should be so construed and interpreted as to harmonize ap-

²¹This ruling is responsive to the following items in the several motions for more definite statement: A. P. Giannini Items C1 and C2 [R. 208-209]; L. M. Giannini, *et al.*, Items 55 and 56 [R. 232-233]; Bank of America etc., as Administrator, Item (16) [R. 245]; A. H. Giannini, *et al.*, Item 6 [R. 263]; Elkus, *et al.*, Item (7) [R. 288-289]; White, Items 55 and 56 [R. 312], 60 and 61 [R. 313].

parently irreconcilable provisions (*Townsend v. Little*, 104 U. S. 504, 512).

Rule 23(b), as we have already pointed out, is a readoption of the general law laid down by the Supreme Court of the United States in a series of decisions, of which *Hawes v. Oakland*, *supra*, 104 U. S. 450, 460-461, is the leading case.

Rule 23(b) requires that complaints in stockholders' actions be verified. This requirement necessarily excludes hypothetical and alternative allegations of the nature pleaded by appellant.

The Washington Code permits a defendant to set up inconsistent defenses, but, as pointed out by this court in *New York Life Insurance Co. v. Graham*, 92 F. (2d) 371, 380, the courts of Washington

“* * * have consistently adhered to the well-defined distinction which departs from the liberality of this rule by excluding pleas of contradictory facts which are so irreconcilable that both cannot be true and where the truth of one necessarily proves the falsity of the other.”

The California rule permits the filing of inconsistent causes of action. However, in *Beatty v. Pacific States S. & L. Co.*, 4 Cal. App. (2d) 692, 697, 41 Pac. (2d) 378, hearing by Supreme Court denied, the District Court of Appeal said:

“We do not think, however, that the rule permitting the pleading of inconsistent causes of action in the

same complaint was ever intended to sanction the statement in a verified complaint of certain facts as constituting a transaction in one count or cause of action, and in another count or cause of action a statement of contradictory or antagonistic facts as constituting the same transaction. In short, the rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts of which he purports to speak with knowledge under oath."

Moreover, we are not concerned at this point with appellant's "statements of a claim" (Rule 8(e)(2)), but rather whether in attempting to avoid the bar of the statute she has made "the fullest possible credible showing" (*Freeman v. Hopkins* (C. C. A. 9), 32 F. (2d) 756, 760 [certiorari denied 280 U. S. 575], quoting from *Robertson v. Burrell*, 110 Cal. 568 [42 Pac. 1086]). Appellant does not make this required showing in a complaint in which she has alleged even the possibility that there were directors with knowledge, who were neither dummies nor conspirators.

The hypothetical and alternative allegations of paragraphs XXIV and XXV were therefore not proper in a stockholder's action in the Federal court. These allegations not only imported ambiguity into the case as the trial court ruled, but they also destroyed the force of the allegations upon which appellant must necessarily depend to show that the claims were not barred as to Trans-america and therefore as to appellant.

If Appellant Made Discovery of the Fraud Complained of From the Order of the Securities and Exchange Commission, Then Her Action Is Barred Against All Defendants as to the Third and Fourth Transactions and as Against Certain of the Defendants as to All of the Transactions.

Appellant alleged in the Second Amended Complaint that she "ascertained the matters, facts, things, circumstances and charges contained in" the order of the Securities and Exchange Commission which was released on November 25, 1938 [R. 185]. She alleged further that this order first came to her notice on April 27, 1939 [R. 184], and she argues in her brief that the latter date is the time of her "first discovery of suspicious circumstances with respect to wrong doing by the corporate management" (Br. p. 86). Appellant failed to allege why she did not learn of the issuance of this order (a public record) at an earlier date, nor did she allege any facts excusing her failure in that regard. These defects were pointed out in the motions for a more definite statement [Items E2, E3—R. 211; Items 53 and 54—R. 232; Items 53 and 54—R. 312]. As a matter of law she was charged with notice of the order at the time it was issued. Under these circumstances the Second Amended Complaint is plainly insufficient (1) against all defendants as to the third and fourth causes of action and (2) against certain of the defendants as to all of the causes of action.

The third transaction (Pacific Coast Mortgage Company) and the fourth transaction (Mallory-Smith Syndicate) were pleaded for the first time in the First Amended Complaint [par. XXXVII-XLI, R. 50-56]. The original complaint, charging that certain of the defendants partici-

pated in pools and earned substantial profits by dealing in Transamerica stock [par. 29, R. 19], was not sufficient to toll the statute on the third and fourth causes of action (16 Cal. Jur. 547).

The original complaint did not name any fictitious defendants and in the First Amended Complaint the following defendants were made parties for the first time: Amadeo P. Giannini, as Executor of the Estate of Virgil D. Giannini, deceased,^{22,23} James A. Bacigalupi, A. H. Giannini, George A. Webster, C. R. Bell, W. W. Garthwaite, Louis Ferrari, Theodore M. Stuart, Herbert E. White, Claire Giannini Hoffman, and Walston & Co., a co-partnership.²⁴ The statute of course was not tolled as to any of these new defendants until the First Amended Complaint was filed.

John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589, 117 Pac. 690, 122 Pac. 835;

Craig v. San Fernando Furniture Co., 89 Cal. App. 167, 264 Pac. 784;

Jackson v. Lacy, 37 Cal. App. (2d) 551, 558, 100 P. (2d) 313.

The First Amended Complaint was filed on December 29, 1941 [R. 64]. This was more than three years after November 25, 1938, the date of the release of the order

^{22,23}An action against one as executor is a different cause of action from an action against the executor, individually. (*Sterrett v. Barker*, 119 Cal. 492, syl. 3, 51, Pac. 695.)

²⁴A suit against a partnership by its partnership name is different from a suit against the partners doing business under the partnership name. (*MacClay Company v. Meads*, 14 Cal. App. 363, 369-373, 112 Pac. 195, 113 Pac. 364.)

of the Securities and Exchange Commission, the reading of which by appellant on April 27, 1939, according to her theory, has fixed the date of discovery (Br. p. 86).

The release of the Commission is designated "Release No. 1950" [R. 417], and the opening words of the order are "For Immediate Release Friday, November 25, 1938" [R. 417].

The court will judicially notice that releases of the Securities and Exchange Commission are given wide publicity in the newspapers. Within a few days after November 25, 1938, appellant (a resident of New York [R. 146]) had available to her from the public press the information from which she claims to have made her discovery some five months later.

Where the matter is of public notoriety the statute begins to run from the time it was made public, and ignorance on the part of the plaintiff is of no avail to prevent the statute from starting to run.

In re Broderick's Will, 21 Wall. 503, 518-519;

Stone v. Winn, 165 Ky. 9, 176 S. W. 933.

In *In re Broderick's Will*, *supra*, the action involved the validity of Senator Broderick's will and sales had in the matter of his estate. The bill alleged that the complainants had no knowledge or information of Broderick's death, of the forgery of the will, of its presentation for probate, of the probate or order of sale, or any of the proceedings until the last of December, 1866, within three years of the filing of the bill (21 Wall. 507). Complainants, however, further expressly charged that it was a matter of public notoriety at San Francisco as early as

1861 that the will in question was not Broderick's will but was a forged and simulated paper (21 Wall. 519). It was held that the cause of action was barred by the California statute of limitations, now subdivision 4 of Section 338, Code of Civil Procedure.

The Supreme Court further held that the fact that plaintiffs lived in a remote and secluded region and had not heard of Broderick's death or of the sale of his property or of any events connected with the settlement of his estate, did not excuse their delay (21 Wall. 519).

In *Stone v. Winn, supra*, it appeared from the record that the claim of fraud was a matter of general public information in the county many years before and it was held that the claim was barred by the statute.

No attempt was made by appellant to excuse her failure to learn of the Commission's order of November 22, 1938, on the date it was released for publication, to wit, November 25, 1938. There are no allegations overcoming the presumption that the regular course of business was followed (California Code of Civil Procedure, Section 1963, subd. 20) and that the release was given the usual wide publicity or that any of the appellees prevented the release from coming to appellant's notice. Appellant does not even tender the excuse offered by Broderick's heirs, namely, living in a remote region; on the contrary, she alleges that she is a citizen and resident of the State of New York [R. 146], and her Second Amended Complaint is verified in the County of Bronx, State of New York [R. 190].

Appellant cites a number of cases in which courts have permitted recoveries after a lapse of considerable time (Br.

pp. 69-80), and she insists that the elements of laches are "inseparable from the merits of the case" (Br. p. 83).

The facts recited by the court in its opinion [R. 325-326] (which included the concession of appellant's counsel that the evidence would consist mainly of conflicting testimony of witnesses relying solely upon their recollection) were sufficient to warrant the court in requiring plaintiff to make a clear showing that the causes of action in favor of Transamerica were not barred by limitations or laches.

Appellant claims that the elements of laches or the absence thereof call for an investigation of all the facts and circumstances of the case (Br. p. 84). She says:

"In the present action, appellant desires the appellees to face a trial upon the merits of the controversy that, among others, the issue of 'laches' if properly and sufficiently presented, may be fairly tried and appellant's case not erased by academic interpretation upon 'motions to dismiss.'" (Br. p. 84.)

The difficulty with appellant's position is that the District Court by granting the motions to dismiss did not foreclose appellant from an opportunity to have the case tried on the merits. It pointed to the defects in the Second Amended Complaint and gave to appellant the opportunity to submit an application for leave to file a further amended pleading in which these defects would be cured. Appellant having elected to stand upon her Second Amended Complaint must show that it was free from the defects pointed out by the various motions and by the court's opinion. She has failed to do so.

The Situation of the Appellees Elkus, Hoelscher, Smith, Walston, Clifford Hoffman, Claire Giannini Hoffman, and Walston & Co.

None of these appellees was ever an officer or director of Transamerica or any other corporation involved in this case, except Elkus, who, as first alleged in the Second Amended Complaint, was a director from February 15, 1932 to April 6, 1932. Neither Claire Giannini Hoffman nor Walston & Co. was named as defendant until the First Amended Complaint was filed.

In neither the original complaint nor the First Amended Complaint was any of these appellees remotely connected to any of the transactions complained of except the Walston transaction. As to the Walston transaction, the allegations were substantially as follows:

(a) In the original complaint it was alleged merely that excessive commissions were paid to Walston & Co. by Transamerica, Bank of America and various unnamed affiliates and subsidiaries, and that this was accomplished by reason of the domination of the boards of directors of said corporations by A. P. Giannini, A. H. Giannini, L. M. Giannini, and John M. Grant.

(b) In the First Amended Complaint it was alleged that security business and funds were diverted from Transamerica to Walston & Co., and that this was done by A. P. Giannini and L. M. Giannini, and knowingly permitted by the directors of Transamerica.

(c) In the Second Amended Complaint these appellees for the first time were connected to and charged with having caused, participated in and profited from *all* of the transactions complained of, including the Walston transaction.

The Second Amended Complaint alleges entirely new and different causes of action against said appellees with the consequence that the statute of limitations continued to run in their favor until August 21, 1942, the date upon which the Second Amended Complaint was filed. (*Merchants National Bank of Santa Monica v. Bentel*, 166 Cal. 473, 137 Pac. 25; *Ronald Press Co. v. Shea*, 27 Fed. Sup. 857; *L. E. Witham Construction v. Remer*, 105 Fed. (2d) 371.) Appellant admits that the statute started to run on April 27, 1939 (Br. p. 86). This was more than three years prior to the filing of the Second Amended Complaint. Accordingly, by this admission of appellant, the action clearly is barred as to these appellees.

The foregoing discussion respecting the statute of limitations (Point III) makes crystal clear the necessity for separately stating the five transactions in separate counts and the correctness of the court's ruling so requiring. Different legal principles are involved in the application of the statute of limitations to these different transactions; the persons and periods of time involved are different; and the time of the commencement of the action is different as to some appellees respecting some of the transactions. We earnestly urge that all transactions are barred as to all appellees. But assuming, though not conceding, that some are not barred, it is obvious that the remaining claims are barred at least against some appellees. Thus it follows that if each transaction were stated in a separate count some of them, if not all, could be disposed of by the plea of the statute as to some, if not all, of the appellees, thus obviating the necessity of such appellees litigating such barred transactions. This was ample justification for the lower court's requirement of separate statements.

IV.

According to the Allegations of the Second Amended Complaint Transamerica's Corporate Subsidiaries Were Indispensable Parties Defendant. The Complaint Was Defective in This Respect. (Answering Appellant's Part Three (Br. pp. 88-96).)

In paragraph II of her Second Amended Complaint appellant alleged that Transamerica was engaged in numerous business enterprises and in the general business of organizing, etc., other corporations "as its corporate subsidiaries, instrumentalities and departments, in the operation of its said business enterprises." Then followed a list of twenty-six corporations, headed by Bank of America National Trust and Savings Association [R. 144-145]. None of these subsidiaries was named as a party defendant in the Second Amended Complaint, nor was any relief asked in behalf of any of them.²⁵

Appellant, in charging the alleged wrongful acts, in each instance used substantially the following language: "Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities," and in alleging who had suffered damages used the same phrase, usually adding the words "and shareholders." The phrase appears in the Second Amended Complaint at least fifty-four times. The

²⁵Bank of America National Trust and Savings Association was named as a defendant in the First and Second Amended Complaints in its capacity as Administrator-with-the-Will-Annexed of John M. Grant, Deceased [R. 24 and 146]. It had been named in its individual or corporate capacity in the original complaint [R. 4 and 5] as a defendant *against* whom relief was sought because a beneficiary of an alleged *ultra vires* contract of Transamerica [R. 13-15]. It was omitted as a defendant in its corporate capacity in the First Amended Complaint [R. 24-26] and in the Second Amended Complaint [R. 146].

principal allegations referred to, arranged according to the five separate and distinct transactions, are epitomized as follows:

1. *First transaction—the salary agreement*: “Said defendants and persons,” *i. e.*, directors of Transamerica not named as defendants, “caused said corporation [Transamerica] and *its corporate subsidiaries*, departments and instrumentalities, to acquire” the capital stock and assets of Bancitaly Corporation and to appear to assume the obligations thereof, including the salary agreement, and the credit entries thereunder [R. 162-163], to make credit entries in favor of A. P. Giannini, L. M. Giannini and Virgil D. Giannini (deceased) in the amount of \$3,700,000.00 [R. 165], and to pay said defendants \$3,700,000.00 [R. 166-167], by reason of which said defendants and persons, and particularly said Gianninis, “were from the funds and assets of defendants, Transamerica Corporation, and *its corporate subsidiaries*, departments and instrumentalities unjustly enriched to the serious and irremediable injury and detriment of said defendant corporation, and *its corporate subsidiaries*, departments, instrumentalities and shareholders” to the extent of at least \$3,700,000.00 [R. 167-168].

2. *Second transaction—diversion of business and payments and advances to Walston & Co.*: Said defendants and said persons “caused said defendant, Transamerica Corporation, and *its corporate subsidiaries*, departments and instrumentalities” to divert all of the investment, security and brokerage business thereof [R. 170], and to disburse from the funds, assets and property thereof sums amounting to not less than \$548,000.00 as brokerage fees and for use as capital, to Walston & Co. [R. 170-171].

The business so diverted at all times “belonged to Transamerica Corporation and *its corporate subsidiaries*, departments and instrumentalities” [R. 171-172]. Said defendants and said persons, particularly the Gianninis, were from the funds, assets and property of “Transamerica Corporation and *its corporate subsidiaries*, departments and instrumentalities, unjustly enriched to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, *its corporate subsidiaries*, departments and instrumentalities” in the sum of approximately \$548,000.00 [R. 172].

3. *Third transaction—Pacific Coast Mortgage Company*: Said defendants and said persons caused “Transamerica Corporation and *its corporate subsidiaries*, departments and instrumentalities” [R. 174, 175] “to pay and advance from the funds, assets and property thereof” \$1,500,000.00 to said defendants and persons to obtain control of Bankitaly Mortgage Company [R. 174-175] and \$1,500,000.00 to Bankitaly Mortgage Company [R. 175], later Pacific Coast Mortgage Company [R. 176]. Said defendants and said persons, through Pacific Coast Mortgage Company “and by and with the use of said defendants’ and persons’ positions with said defendant, Transamerica Corporation, and *its corporate subsidiaries*, departments, and instrumentalities, and the confidential and special knowledge and information gained thereby” engaged in speculative operations. Said Pacific Coast Mortgage Company “earned and collected” a profit aggregating not less than \$2,000,000.00, which was paid to and received by said defendants and said persons by reason of which each of them and particularly the Gianninis was unjustly enriched “to the serious and irremediable injury

and detriment of defendant Transamerica Corporation, and *its corporate subsidiaries*, departments, instrumentalities and shareholders” in the sum of approximately \$2,000,000.00 [R. 176-177].

4. *Fourth transaction—Mallory-Smith Syndicate:* Said defendants and said persons caused “Transamerica Corporation, and *its corporate subsidiaries*, departments and instrumentalities * * * to pay and advance from the funds, property and assets thereof” sums aggregating not less than approximately \$3,000,000.00 to the trustees, Smith and Mallory, for use as capital [R. 178]. Said defendants and said persons, through said trust syndicate “and with and by the use of their official positions with the defendant, Transamerica Corporation, and *its corporate subsidiaries*, departments and instrumentalities, and the special and confidential knowledge and information gained thereby” engaged in speculative operations and the syndicate “earned and collected” a profit of approximately \$300,000.00, which was paid to and received by said defendants and said persons, by reason of which each of them “was unjustly enriched to the serious and irreparable injury and detriment of the defendant, Transamerica Corporation, and *its corporate subsidiaries*, departments, instrumentalities and shareholders” to the extent of approximately \$300,000.00 [R. 179-180].

5. *Fifth transaction—expenditure of corporate funds in the market:* Said defendants and said persons caused “Transamerica Corporation, and *its corporate subsidiaries*, departments and instrumentalities” to engage in the business of manipulating and stirring the market for the capital stock of Transamerica, and “said defendant, Transamerica Corporation, *its corporate subsidiaries*, de-

partments and instrumentalities, incurred large items of expense and suffered substantial losses in the operation of such business” aggregating not less than \$2,250,000.00 “to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, *its corporate subsidiaries*, departments, instrumentalities and shareholders” in the sum of not less than approximately \$2,250,000.00 [R. 181].

The Second Amended Complaint prayed for an accounting and for a judgment “in the sums and amounts to which plaintiff and the defendant Transamerica Corporation may be entitled under the law and evidence, amounting in all to a sum not less than Eight Million, Seven Hundred and Ninety-eight Thousand Dollars (\$8,798,000.00), with proper legal interest thereon” [R. 189].

No relief was asked in behalf of any of the subsidiaries, no one of which was named a defendant.

Appellees attacked the Second Amended Complaint in respect to the allegations above mentioned, as follows:

(1) By their motions to dismiss upon the ground (among others) that *the subsidiaries were indispensable parties* [R. 194, ground (d); R. 218, ground 2; R. 239, ground (5); R. 256-257, ground (d); R. 297, ground (d)].

(2) By their motions for a *more definite statement* [R. 199-204; 223-227; 243; 302-306; 312-313].

In granting the motions to dismiss, the court did not specifically mention the ground that the subsidiaries were indispensable parties. The court, however, did refer to the fact that the Second Amended Complaint listed twenty-six corporations as subsidiaries of Transamerica, and ap-

pellant's allegations that as result of the alleged wrongful acts "both Transamerica and also in some greater or lesser degree, these numerous subsidiaries sustained substantial losses" [R. 357-358].

The court ruled that the allegations of the Second Amended Complaint relating to the subsidiaries were indefinite in some of the respects mentioned in the motions for a more definite statement [R. 199-204; 223-227; 302-306].

Specifically, the court ruled:

"The parties herein sued are entitled to be informed whether plaintiff claims that not only Transamerica but also each and all of these twenty-six subsidiaries, or if only some then which of the latter, acquired all of the capital stock and all of the assets and assumed all of the liabilities of Bancitaly corporation, including the alleged fraudulent salary agreement. Likewise, they ought to be apprised whether she asserts that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, entered upon their books credits and disbursed funds on account of the provisions of said agreement. * * * In addition they are entitled to be advised whether plaintiff claims that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, participated in the remaining series of alleged wrongful acts, including the so-called Walston and Company transactions, the Pacific Mortgage Company dealings, the so-called Smith and Mallory trust syndicate transactions and the stock market manipulations." [R. 358-359.]

At the outset it should be observed that appellant has apparently disavowed any intention of making the action

at bar a double derivative action (*i. e.*, an action by a stockholder of a parent corporation to recover judgment in behalf of a subsidiary for a wrong done the subsidiary). She does not pray for a judgment in favor of the subsidiaries [R. 189]. The subsidiaries have not been made parties, as would be necessary were plaintiff seeking judgment in their favor (*Goldstein v. Groesbeck* (C. C. A. 2), 142 F. (2d) 422, decided April 7, 1944; *Druckerman v. Harbord*, 22 N. Y. S. (2d) 595, 597). She has not alleged that she appealed to the boards, or any of the boards of directors of the subsidiaries, or any one thereof, neither has she alleged facts showing that such an appeal would have been unavailing. Such allegations are necessary (*Wachsman, et al. v. Tobacco Products Corporation of New Jersey* (C. C. A. 3), 129 F. (2d) 815, 817-818; *Warren Telephone Co. v. Staton*, 46 Ohio App. 505, 189 N. E. 660, 664).

The theory disclosed in appellant's brief on this point (Br. pp. 88-96) is that a judgment in favor of the parent corporation may be rendered upon rights of action of the subsidiaries. For each dollar paid *from the funds of a subsidiary* on account of the salary agreement or as brokerage fees or as expenses, and for each dollar of profit "earned and collected" by Pacific Coast Mortgage Company or by the Mallory-Smith syndicate [R. 177, 180] *on money loaned by a subsidiary*, appellant is seeking to recover a dollar (with interest) *for Transamerica*. This measure of damages, adopted in each of the five transactions as well as in the prayer [R. 189], and the contentions made by appellant in her brief, definitely show that appellant is seeking a judgment in favor of Transamerica, at least in part, for the alleged wrongs done to its subsidiaries.

Appellant's theory is stated in her brief as follows:

“* * * where a parent corporation owns, controls and operates corporate subsidiaries as departments, instrumentalities or agencies for *the conduct of its general business*, the assets and property of such corporate departments are, in equity, the property and assets of the parent corporation, and likewise the losses and debts of such corporate departments are equally the losses and debts of the parent corporation. Independent entities of the corporation departments and agencies are so far disregarded that each is considered a part of the *individual whole*.” (Br. pp. 88-89, italics appellant's.)

This theory is based upon the allegations of paragraph II of appellant's Second Amended Complaint [R. 144] and four cases which we will shortly notice (Br. pp. 90-95).

Paragraph II of the Second Amended Complaint [R. 144] alleges that Transamerica has been at all times since its incorporation and now is “engaged in numerous business enterprises, including among others a general business involving and devoted to financial, investment, brokerage, insurance, and real estate enterprises, and also a general business of organizing, acquiring, holding, owning, controlling, maintaining and operating, other corporations and associations as its corporate subsidiaries, instrumentalities and departments, in the operation of said business enterprises, including the following corporate subsidiaries, departments and instrumentalities:” (listing twenty-six corporations).

A corporate “department” in the accepted sense of the word is not a separate entity, has no title or separate cor-

porate existence. The Second Amended Complaint, in alleging that the corporations listed are departments and instrumentalities of Transamerica, does not allege ultimate facts but mere conclusions of law.²⁶ Moreover, appellant's contention that Transamerica "operates corporate subsidiaries as departments, instrumentalities or agencies for *the conduct of its general business*" (Br. p. 88—italics appellant's) is not supported by the allegations of paragraph II, is contrary to other allegations appearing in the Second Amended Complaint and to allegations appearing in the original complaint, but omitted from the First and Second Amended Complaints.²⁷

One of the twenty-six corporations listed in the Second Amended Complaint [R. 144-145] (Bank of America National Trust and Savings Association) is a national banking association, and two (Occidental Life Insurance Company and Pacific National Fire Insurance Company) are insurance companies, operating as to internal affairs, under the jurisdiction of, and *requiring a special permit from*, the Comptroller of the Currency and the state insurance authorities, respectively. The court will judicially notice that Transamerica is not conducting either a banking or an insurance business (*Chavez v. Times-Mirror Co.*, 185 Cal. 20, 23, 195 Pac. 666).

Another subsidiary (Bancitaly Corporation) is shown by the allegations of paragraph XXVI of the Second

²⁶Appellees pointed out this defect in their motions for a more definite statement [Items A1 and A2, R. 199; Item 2, R. 243; Items 57 and 58, R. 312-313].

²⁷The court is entitled to consider the allegations of the earlier complaints. (*Wennerholm v. Stanford University School of Medicine*, 20 Cal. (2d) 713, 716, 128 P. (2d) 522.)

Amended Complaint to have been a corporation as early as April 13, 1927 [R. 164], more than a year prior to the incorporation of Transamerica on October 11, 1928 [R. 144], and according to the allegations of paragraph XXII of the First Amended Complaint, Bancitaly Corporation was organized on June 10, 1919 [R. 35].

Nowhere in her Second Amended Complaint does appellant allege that the subsidiaries are wholly owned by Transamerica. On the contrary, two of the subsidiaries listed, namely, Bankitaly Mortgage Company and Pacific Coast Mortgage Company [R. 145], are shown to be one and the same company [R. 176], and it is alleged in paragraph XXXV of the Second Amended Complaint that in 1932 A. P. Giannini, L. M. Giannini and Virgil D. Giannini acquired "the controlling interest in the capital stock of said Bankitaly Mortgage Company" [R. 174-175]. Also, it appears from the allegations of paragraph 23 of the original complaint, "That in or about July, 1937, Bank of America ceased to be a wholly owned or virtually wholly owned subsidiary of Transamerica as aforesaid, and thereafter Transamerica owned approximately 30% of the stock of Bank of America" [R. 15].

The allegations of the Second Amended Complaint upon which appellant relies to support her theory go no further than to show that Transamerica was a holding company of the same character as American Power & Light Company, the parent corporation of which the plaintiff in *Goldstein v. Groesbeck* (C. C. A. 2), *supra*, 142 F. (2d) at p. 424, was a stockholder and in whose right the plaintiff brought a double derivative action. In holding that a double derivative action was permissible, the Court of Appeals for the Second Circuit relied on the fact

that Section 51 of the Judicial Code (28 U. S. C., Sec. 112) had been amended by Congress (April 16, 1936, c. 230, 49 Stat. 1213) so as to permit a stockholder of a parent corporation to sue double derivatively and obtain jurisdiction over the subsidiaries who were indispensable parties (see Opinion, *Goldstein v. Groesbeck*, *supra*, footnote 3, 142 F. (2d) 426).

As we have pointed out, appellant has not brought a double derivative action. She claims the right to recover a judgment in behalf of Transamerica upon choses in action belonging to the subsidiaries (1) without making any of the subsidiaries a party and (2) without even specifying the subsidiary or subsidiaries injured in the five separate and distinct transactions.

Appellant cites four cases in support of her theory. Generally speaking, these cases hold that under the particular circumstances therein considered equity, in order to prevent a miscarriage of justice, would ignore the corporate entity of the subsidiary. All of the four cases appear to recognize, if not expressly state, the general rule that the corporate subsidiary does not lose its separate identity merely because all of its stock is owned by another corporation. In each case the court was of the opinion that the particular facts warranted a departure from the general rule. We will briefly analyze these four cases.

In *Kimberly Coal Co. v. Douglas* (C. C. A. 6), 45 F. (2d) 25 (Br. pp. 90-91), it was held that a state court judgment in favor of a lessor and against a parent corporation created an estoppel which precluded the lessor from recovering an additional amount (disclaimed in the state action) from a subsidiary on the same cause of action, although the subsidiary was not a party to the state

action. The commissary stock on the leased premises had been transferred by the parent to the subsidiary in exchange for the capital stock of the latter. It was conceded that the subsidiary was a mere instrumentality for the conduct of the parent's business (45 F. (2d) 26). It will be observed that the estoppel was *against* the appellant who was a party to both actions. The court did not intimate, much less decide, that a parent corporation may recover on a claim belonging to its subsidiary in an action in which the subsidiary is not a party, or that a judgment entered in such an action would operate as an estoppel *against* the subsidiary.

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n*, 247 U. S. 490 (Br. pp. 91-92), a terminal railroad owning terminal track in the City of Minneapolis was controlled jointly by two parent railroads. An extra charge to shippers was made by the parent railroads for receiving cars from the subsidiary, which was passed on to the subsidiary and returned in part to the parents as dividends. There was a long term contract "of much significance" (247 U. S. 495) among the three companies, which the Supreme Court said was designed to take away from the directors of the subsidiary the normal legal control of the company's affairs in several important respects (247 U. S. 496). After making the statement quoted in appellant's brief (Br. pp. 91 and 92), the Supreme Court agreed with the state courts

"that *the fact that the legal title to what are obviously terminal or spur delivery tracks is in the East-*

ern Company [the subsidiary] should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning companies" (247 U. S. 501).

In *Centmont Corporation v. Marsch* (C. C. A. 1), 68 F. (2d) 460 (Br. pp. 92 and 93), the court made the statement quoted by appellant (Br. pp. 92-93) and held that appellant's assigned claim of the parent corporation against the subsidiary (in receivership at the parent's instance) was not on a parity with the claim of the appellee who was a direct creditor of the subsidiary. The parent was a railroad company which had organized the subsidiary railroad company for the purpose of extending its line into the State of Massachusetts.

In *Roof v. Conway*, 133 F. (2d) 819 (Br. pp. 93-95), it appeared that some years before the federal receiver of Indiana, Columbus & Eastern Traction Company, with the informal approval of the court (the District Court of the *Northern* District of Ohio), caused a subsidiary to be formed to operate a bus line. The subsidiary entered into an agreement with appellants. Thereafter the Traction Company receiver sold all the company's assets to Cincinnati & Lake Erie Railroad Company, including the stock of the subsidiary and the rights under the contracts with appellants. Later the Railroad Company went into federal receivership in the *Southern* District of Ohio and all of the capital stock of the subsidiary "was embraced in the order marshaling assets" (133 F. (2d) 821). The

District Court for the Northern District of Ohio transferred the Traction Company receivership to the Southern District. This present action was brought in the Southern District of Ohio by the federal receivers of the Railroad Company to restrain appellants from breaching their contract with the subsidiary. The jurisdiction of the District Court of the Southern District to restrain the breach of contract depended upon whether or not the subject matter was in the custody of that court so as to make the pending action "dependent upon and ancillary to the cause in which the Cincinnati & Lake Erie Railroad Company is being operated in receivership" (133 F. (2d) 822). The Circuit Court of Appeals, after making the statement quoted in appellant's brief (pp. 93-95), held that the District Court had jurisdiction.

Nothing that is said in any of the cases cited by appellant tends to disclose any error on the part of the court below in holding that appellees were entitled to a more definite statement in respect to the subsidiaries of Transamerica [R. 358-359]. None of these cases supports appellant's contention that Transamerica's subsidiaries are not necessary or indispensable parties to this action. In *Kimberly Coal Co. v. Douglas, supra*, the moving party which was held to be estopped by the prior judgment was a party to both actions. In *Chicago, etc. Ry. Co. v. Minneapolis, etc. Association, supra*, both parent corporations and the subsidiary were before the court. In *Centmont Corporation v. Marsch, supra*, the subsidiary, the parent, the parent's assignee and the creditor of the subsidiary were all before the court. In *Roof v. Conway, supra*, all the stock of the subsidiary had been marshaled and was in the custody of the court through its receiver, and the

subsidiary was wholly under the control of the court, as much so as if it were a party by name.

No reasons of justice or equity have been advanced by appellant herein as to why the court should pierce the corporate veil of Transamerica's subsidiaries. Since the 1936 amendment to Section 51 of the Judicial Code (28 U. S. C., Sec. 112) Congress has provided a simple remedy for the stockholder of a parent corporation who claims the subsidiaries have been injured, namely, a double derivative suit in which the subsidiaries are named and served as defendants.

In the case at bar, where appellant is seeking to recover in behalf of Transamerica for a chose in action belonging to the subsidiary, neither the factual premise nor the legal argument which form the basis of appellant's contentions (Br. pp. 88-89) can be conclusively determined so as to protect the individual defendants in the absence of the subsidiaries as parties to the action.

Although the cases of *Greenberg v. Giannini*, 140 F. (2d) 550, and *Philipbar v. Derby* (C. C. A. 2), 85 F. (2d) 27, involve the indispensability of the corporation as a party before the court in a single derivative action, the reasoning of the opinions is directly applicable here.

In *Greenberg v. Giannini*, *supra*, Greenberg, a stockholder of Transamerica, brought identical actions in the New York State court and in the Federal District Court for the Southern District of New York to recover judgment in favor of Transamerica against Amadeo P. Giannini on account of payments under the salary agreement. A. P. Giannini was served, and removed the state action to the Federal court where the two actions were heard to-

gether. Plaintiff then served Transamerica in Delaware. The purported service on the corporation was set aside and the actions dismissed on A. P. Giannini's motion. On appeal, the Circuit Court of Appeals affirmed. The court held that since Transamerica was not doing business in New York and A. P. Giannini was a resident of California, the service on Transamerica in Delaware was invalid and unauthorized under Title 28, U. S. C., Section 112. The stockholder (Greenberg) however appeared "to suggest, perhaps to argue, that, since Transamerica Corporation was the creature of Giannini, and had no independent will, it is to be treated as though it had actually appeared in the action" (140 F. (2d) 553). The court refused to accede to this argument on the authority of *Philipbar v. Derby, supra*, 85 F. (2d) 27.

Turning to defendant A. P. Giannini's motions to dismiss the complaint in both actions, the court said:

"* * * it has been settled law for over a century (Cunningham v. Pell, 5 Paige, N. Y., 607) that the wronged corporation is an indispensable party to a shareholders' action. *City of Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Baltimore & Ohio R. Co. v. City of Parkersburg*, 268 U. S. 35, 45 S. Ct. 382, 69 L. Ed. 834; *Philipbar v. Derby, supra*, 85 F. 2d 27, *Cf. Niles-Bement-Pond Co. v. Iron Moulders' Union*, 254 U. S. 77, 41 S. Ct. 39, 65 L. Ed. 145. *It is hornbook law that the claim is the corporation's, and for that reason the delinquent directors will not be protected by any judgment which does not conclude the corporation.* If they succeed in defeating the action, other shareholders may bring another; if the recovery is too little, the same thing is possible. Therefore, as soon as the service of process upon the

Transamerica Corporation was set aside in the case at bar, it became inevitable that the complaints against Giannini should be dismissed.”

140 F. (2d) 554.²⁸

In *Philipbar v. Derby, supra*, the same situation obtained. There a stockholder of Derby Oil and Refining Corporation brought an action in New York, which was removed to the Federal court. Derby alone was served. Process could not be had against the corporation. The Circuit Court of Appeals, in affirming the judgment of dismissal, held that the corporation was an indispensable party defendant whose presence was necessary in order to protect the defendants. Plaintiff urged, however, that Derby should not be permitted to raise the point, because he was alleged to have been concerned in its refusal to appear voluntarily. The court denied this contention, saying:

“This curious argument misses the reason why the corporation must be made a party at all. A decree in a suit against Derby, based on the theory that he was preventing the corporation from appearing, would bind it as little as though that allegation were absent. If this suit broke down, Derby would be sub-

²⁸In accord with the principle that the wronged corporation is an indispensable party are *Southern California Home Builders v. Young*, 45 Cal. App. 679, 684, 188 Pac. 586; *Pourroy v. Gardner*, 122 Cal. App. 521, 526, 10 Pac. (2d) 815. And see *Kelly v. Thomas*, 234 Penn. 419, 83 A. 307, 310, in which the court says: “Not only was its presence necessary to the plaintiff, but the defendants were entitled thereto so that the corporation might be concluded by any decree entered against them, and the company itself was entitled to notice in order that its interests and the rights of its creditors might be protected.”

ject to another; if it succeeded, he would also be subject to another to recover more than the amount of any decree herein.”

85 F. (2d) 30-31.

The contention of appellant in the case at bar as a ground why Transamerica may recover judgment on choses in action belonging to its subsidiaries in its essence is that factually and as a matter of law the subsidiaries were the *alter egos* of Transamerica. This contention is analogous, if not identical, with that unsuccessfully advanced by the plaintiff in *Greenberg v. Giannini*. The contention here advanced by appellant is not different in principle from that which the court designated the “curious argument” unsuccessfully made by the plaintiff stockholder in *Philipbar v. Derby, supra*.

Finally, the general rule is that the assets of a subsidiary belong to the subsidiary and not to the parent corporation.

Childress v. Hinch, 162 Okla. 296, 20 P. (2d) 571, 573;

In re Green's Estate, 231 N. Y. 237, 131 N. E. 900, 904;

Button v. Hoffman, 61 Wis. 20, 20 N. W. 667, 668-669.

In *Wormser, “Disregard of the Corporate Fiction”* (1927 ed.), pp. 17 and 18, the learned author says:

“And the fact that the owner of all the stock is another corporation, has been held to make no difference in principle, since title to corporate property is in the corporate personality, and not in its stockholders, whether individual or corporate.”

Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic and Commerce Ass'n, *supra*, 247 U. S. 490, one of the four cases relied on by appellant (Br. pp. 91-92), is in accord. The court there admitted the fact to be that legal title to the terminal or spur delivery tracks was in the subsidiary (247 U. S. 501, quoted *supra*). It merely held that this fact should not be used as an excuse to impose an additional charge upon the general public.

The long and short of the matter is that if, as appellant has alleged, Transamerica's subsidiaries suffered "irremediable injury and detriment," measurable in specific sums, because of the wrongful acts of the individual defendants, the law confirms the legal title to these choses in action in the respective subsidiaries and gives to appellant a remedy to redress these wrongs in behalf of the subsidiaries actually suffering injury, namely, *by making the subsidiaries parties defendant* and stating the respective claims in their favor (*Goldstein v. Groesbeck*, *supra* (C. C. A. 2), 142 F. (2d) 422, decided April 7, 1944). Since the law gave her this remedy, there was no occasion for her to appeal to equity to disregard the corporate entities of the subsidiaries. Instead of following this procedure, appellant, without making the subsidiaries parties or identifying the particular subsidiary injured or the amount of such injury, has attempted to recover in behalf of Transamerica for the wrongs done the subsidiaries under a theory which is not sustained by the authorities and is untenable.

The vague, indefinite and general allegations of appellant in her Second Amended Complaint in reference to the subsidiaries of Transamerica go to the very gist and foundation of her several claims. Even if appellant's

theory were correct, appellees would still be entitled to be informed of the matters specified by the court in the rulings quoted under this point. Appellant's theory is not sound—she cannot recover judgment for Transamerica in this action on choses in action belonging to the subsidiaries without making the subsidiaries parties to the action and parties to the judgment.

Appellant says that it is reasonable to assume that information relating to the subsidiaries would not be made available to her (Br. pp. 95-96) and that in a case of this character to require her to set out the information would be unreasonable (Br. p. 96). It is somewhat difficult to understand the basis for these suggestions (see statement of her counsel at the hearing of the motions directed at the Second Amended Complaint [R. 479]). She was not under this disability when she stated her cause of action under the salary agreement in the original complaint (see paragraph 13 thereof [R. 9].)²⁹ In stating her fifth cause of action in her First Amended Complaint she was able to identify the subsidiaries involved [R. 56 and 57]. Nor is it unreasonable to require a stockholder of a parent corporation who asserts that the subsidiaries have suffered injury and detriment to name the subsidiaries suffering the particular detriment and to make them parties defendant. The defect in appellant's Second Amended Complaint is more than a mere matter of uncertainty—it is a lack of indispensable parties defendant.

Appellant's theories are untenable and are not supported by the authorities upon which she relies.

²⁹Greenberg also had no difficulty in this regard. (*Greenberg v. Giannini, supra*, 140 F. (2d) at 551.)

V.

The Language of the Second Amended Complaint Is Vague, General and Indefinite, and the Gravamen of Its Charges Consists of Conclusions of Law or of the Pleader. Accordingly, the Second Amended Complaint Fails to State a Claim Against Appellees. (Answering Appellant's Part One, Br. pp. 43-68.)

In our argument on the statute of limitations (*supra*, Point III) and in reference to the subsidiaries (*supra*, Point IV), we pointed out a number of uncertainties and ambiguities going to the gist of plaintiff's claims. In addition to those noted, appellant in her Second Amended Complaint made use of conclusions of law rather than alleging ultimate facts.

Appellant alleged that the salary agreement and the credit entries were "pretended, fraudulent and fictitious" [R. 162, 163, 165], and also that the entries were computed upon "false, fictitious, unearned and unrealized profits" [R. 166].

In stating each of her five claims every corporate act of Transamerica and its subsidiaries was alleged to be "without legal right or authority" [R. 162, 165, 170, 171, 174, 175, 178, 179 and 181].

In addition to the grounds of the motions to dismiss considered in the argument under previous headings, most of said motions were also made upon the general ground that the Second Amended Complaint failed to state a

claim against appellees [Item (a), R. 193; Item 1, R. 218; Item (1), R. 238; Item (a), R. 256; Item (a), R. 296].³⁰

The motions for a more definite statement, in addition to the items noted in the argument under the preceding headings (Points III and IV, *supra*), specifically pointed out defects in the Second Amended Complaint consisting of the use of conclusions of law [record references, footnote 31, *post*].

The trial court in its opinion criticized the Second Amended Complaint, saying that it charged fraudulent and illegal acts by way of legal conclusions and recitals more or less vague and indefinite [R. 336-337; 353] and was replete with surplusage and repetitions [R. 353]. The court pointed out other matters "left to conjecture" [R. 337] and the lack of definiteness in charging violation of plaintiff's rights, citing Rule 9(b), which provides that "In all averments of fraud * * * the circumstances constituting fraud * * * shall be stated with particularity" [R. 347]. For the pleader to label the transactions concerning the salary agreement as fraudulent, fictitious, pretended and as being without legal right or authority, the court declared, was pleading legal conclusions rather than the facts from which the legal conclusions could be drawn [R. 357].

The court concluded:

"In the light of the allegations and admissions in her pleading, and in view of the circumstances and

³⁰The motion to dismiss of Bank of America, etc., as Administrator, upon the general insufficiency of the Second Amended Complaint, expressly recited that the allegations of wrongful acts were the pleader's conclusions [Item (1), R. 238].

conditions to which attention previously has been directed, we are persuaded that before it can be held that plaintiff has a cause or causes of action against defendants or any of them * * * it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint" [R. 358].

In addition to holding that defendants were entitled to be informed more definitely in respect to the allegations touching the statute of limitations considered in Point III, *supra*, and the allegations in reference to the subsidiaries considered in Point IV, *supra*, the court further concluded:

"Furthermore, they [defendants] should be informed respecting the ultimate facts upon which the pleader bases her charges to the effect that said [salary] agreement and the other transactions mentioned were fraudulent, fictitious and pretended, and without legal right or authority" [R. 358-359].³¹

The allegations of the Second Amended Complaint, that the salary agreement and the credits were pretended, fraudulent and fictitious, are plainly conclusions of law.

³¹This ruling was responsive to the following items in the motions for more definite statement: A. P. Giannini, Items B1 [R. 204], B3, B4, B5, B6 and B7 [R. 205], B11 and B12 [R. 206], B15 and B19 [R. 207], B23 [R. 208]; L. M. Giannini, *et al.*, Items 29 and 30 [R. 228], 32, 33, 34 and 35 [R. 229], 39, 40 and 43 [R. 230], 47 [R. 231] and 50 [R. 231-233]; Bank of America etc., as Administrator, Items 17 [R. 245], 18, 19, 20 and 22 [R. 246], 31 [R. 248], 36 [R. 249], 44 [R. 250]; A. H. Giannini, *et al.*, Items 7, 8, 9, 10 and 12 [R. 263-264]; Elkus, *et al.*, Items 10, 11 and 12 [R. 289-290]; White, Items 29 [R. 307-308], 30, 32, 33, 34 and 35 [R. 308], 39 and 40 [R. 309], 43 and 47 [R. 310] and 50 [R. 311].

In *Allen, et al. v. Montana Refining Co.*, 71 Mont. 105, 227 Pac. 582, a stockholder's action, it was held in the language of the twelfth syllabus:

“Allegation that pretended indebtedness of corporation to another was fictitious and sham was mere conclusion of pleader and of no force or effect.”

The allegations that each of the corporate acts of Transamerica “was done without legal right or authority” is clearly a conclusion of law.

Hedges v. Dam, 72 Cal. 520, 522;

See also:

1 *Bancroft's Code Pleading*, pp. 106, 107 and 117.

Appellant does not deny that these are conclusions of law. She boldly asserts that “under the present rules ‘legal conclusions’ are not prohibited but on the other hand are expressly permitted where they tend to a simple, concise and direct statement of a claim” (Br. p. 45).

The allegations of the Second Amended Complaint are vague, general and indefinite, and the gravamen of the charges consists of conclusions of law or of the pleader. Under the rules of pleading as they have been generally understood and practiced, such a complaint fails to state a cause of action and is vulnerable to a motion to dismiss or a general demurrer.

The following cases, all decided in *stockholder actions*, amply support the foregoing proposition:

Swan v. Consolidated Water Co. (C. C. A. 9), 28 F. (2d) 971, 972-974;

Loney v. Consolidated Water Co., 122 Cal. App. 350, 9 Pac. (2d) 888;

Smith v. Stone, 21 Wyo. 62, 128 Pac. 612, 616 (holding that while uncertainty and lack of definiteness in a complaint is ordinarily to be corrected by a motion to render the pleading more definite, nevertheless where the defects relate to many material facts, the complaint fails to state a cause of action);

Davis v. Cohn, 260 App. Div. 624, 23 N. Y. S. (2d) 104, 105-106;

Brandt v. McIntosh, 47 Mont. 70, 130 Pac. 413, 414-415;

Weinberger v. Quinn, *supra*, 264 App. Div. 405, 35 N. Y. S. (2d) 567, 571-572; affirmed without opinion, 290 N. Y. 635, 49 N. E. (2d) 131.

The allegations of the Second Amended Complaint, that the profits of Bancitaly Corporation were fictitious, unrealized, etc., and untrue and did not truly and correctly represent the actual and true net profits of Transamerica and its subsidiaries [R. 165-166], are plainly defective. For aught that appears from the Second Amended Complaint the amount by which the profits were false, fraudulent, fictitious and untrue may have been

“* * * the smallest fraction of one per cent, and such being the case the rule of *de minimis* would bar a recovery.”

Fox v. Mackay, 125 Cal. 54, 56 (a stockholder action).

Appellant contends that the new rules call only for “notice-pleading” rather than “fact-pleading” and authorize the use of conclusions of law, and in support of her contention quotes an article from 38 *Columbia Law Re-*

view, 1179 (Br. p. 45), and a number of cases. Two of the cases cited were decided by the Circuit Courts of Appeals for the Third and Fifth Circuits, respectively, a third case (*Securities and Exchange Commission v. Timetrust, Inc.*, 28 F. Supp. 34, Br. p. 46), is a decision of the District Court of the Northern District of California, and the remaining are from District Courts of other circuits. None of the cases cited is a stockholder's derivative suit, as appellant concedes (Br. p. 53). None of them except the *Timetrust* case involved charges of fraud, and that case involved statutory fraud and the allegations of the complaint were in the language of the statute (28 F. Supp. 42; and see 4 *Cyc. Fed. Proc.* (2d ed.) 656, footnote 92, citing the *Timetrust* case).³²

In *Continental Collieries, Inc. v. Shoher* (C. C. A. 3), 130 F. (2d) 631 (Br. p. 49), and *DeLoach v. Crowley's, Inc.* (C. C. A. 5), 128 F. (2d) 378 (Br. pp. 50-52), the trial courts apparently had not afforded plaintiff an opportunity to submit a further pleading, for the judgments of dismissal were entered upon the orders granting the motions to dismiss. In the case at bar the judgment of dismissal was entered after plaintiff had failed to ask for leave to amend within the forty-five day period expressly granted her.

In the cases cited by appellant the courts appeared to be impressed with the language of the rules (relied on

³²This court recently reversed the final judgment in this case (39 F. Supp. 45—referred to in the brief, p. 49) as to defendants Bank of America, A. P. Giannini and L. M. Giannini, all of whom, as well as John M. Grant (deceased), were completely exonerated. Appellant herein particularly singled out these defendants in stating the facts in the *Timetrust* case (Br. p. 46).

by appellant, Br. p. 44) that the complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief" (Rule 8(a)(2)), and that "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required" (Rule 8(e)(1)). In one of the cases (*DeLoach v. Crowley's, Inc.*, *supra*, 128 F. (2d) 378) the court referred to Rule 8(f), which provides that "All pleadings shall be so construed as to do substantial justice" and confessed that "Just what this means is not clear * * *" (128 F. (2d) 380—quoted Br. p. 51).

The clauses in Rule 8 above referred to are not new or strange to the bench and bar of the western states.

Since 1872, Section 452 of the *California Code of Civil Procedure* has provided that

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."

With the exception of Arizona, all of the other states in the Ninth Circuit, as well as the Territory of Alaska, have similar code provisions (1 *Bancroft's Code Pleading*, p. 149, footnote 10).

Since 1872, Section 426 of the *California Code of Civil Procedure* has provided that the complaint shall contain

"* * * a statement of the facts constituting the cause of action, in ordinary and concise language * * *."

The codes of Arizona, Idaho, Montana and Oregon contain a similar provision (1 *Bancroft's Code Pleading*, p. 66, footnote 17). The language of Section 426 of the California Code of Civil Procedure does not appear to be substantially different from the language of Rule 8 upon which appellant relies (Br. p. 44).³³

The foregoing code provisions have never been construed (as appellant would construe similar language in the Federal Rules (Br. p. 45)) so as to authorize a plaintiff suing in his own right, much less a plaintiff in a stockholder's action, to state a claim by the use of vague and indefinite recitals or of conclusions of law. No valid reason has been advanced why the new Federal Rules, similar in these respects to the provisions of most of the codes of the western states, should receive a different construction.

In *Fleming v. Dierkes Lumber & Coal Co.* (D. C. Ark.), 39 F. Supp. 237, relied on by appellant (Br. p. 52), the District Judge said:

"I am of the opinion that the framers of the rules did not intend to permit a plaintiff to subject a de-

³³Section 426, C. C. P., and other cognate sections have the effect of entitling plaintiff to "any relief embraced in the issues" (*Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55, 57). Several kinds of relief may flow from a single cause of action (*Beronio v. Ventura County L. Co.*, 129 Cal. 232, 235, 61 Pac. 958). The rule is the same in other western states (see 1 *Bancroft's Code Pleading*, p. 12, note 14, and p. 199, note 3). The phrase "cause of action" as used in the codes of the western states is thus identical in meaning with "statement of claim showing that the pleader is entitled to relief." Compare also Sec. 427, *California Code of Civil Procedure*, where the language "claims arising out of the same transaction, or transactions connected with the same subject of action" is treated as synonymous with the phrase "several causes of action."

fendant to the various processes of the court without first stating definite facts upon which a judgment might be based.”

39 F. Supp. 240.

And further:

“The rule should not be so liberally construed as to destroy definiteness in pleading. A ‘short and plain statement’ must be reasonably definite or it will not be plain.”

39 F. Supp. 240.³⁴

While the decision in *Macleod v. Cohen-Erichs Corporation*, 28 F. Supp. 103, cited by appellant (Br. p. 56), indicates that in ordinary cases fair notice may be given by conclusions of law, and this view finds support among some of the professors of law (see 4 *Cyc. Fed. Proc.*, Sec. 1114, pp. 379-380), there are authorities to the contrary.

Zimmerman v. National Dairy Products Corp. (D. C. N. Y.), 30 F. Supp. 438, 439.

In *Brogdex Co. v. Food Machinery Corp.* (D. C. Del.), 29 F. Supp. 698, 699, it was held that it may not be improper to allege conclusions of law in order to show “the relation of the various facts to one another and to the relief sought.” But in the case at bar conclusions of law are alleged in lieu of or as a substitute for the ultimate facts. As the District Court pointed out, appellant was not “stating the ultimate facts from which,

³⁴A discussion of the question of “notice-pleading” may be found in 4 *Cyc. Fed. Proc.* (2d ed.), Sec. 1092, pp. 341-349.

if proved, such legal conclusions might properly be drawn, but rather pleading the legal conclusions themselves" [R. 357].

In 13 *Cyclopedia of Federal Procedure* (2d ed.) p. 451, it is said:

"The complaint in a stockholders' suit is, of course, governed by the general rules in regard to complaints as set out in the Federal Rules of Civil Procedure, and general and inferential averments or mere conclusions of fraud or wrongdoing, or of illegality or *ultra vires* action, are bad pleading, just as they are in any other complaint."

There are several reasons why a plaintiff in a stockholder action should not be permitted to state the gravamen of a claim by the use of vague and indefinite recitals and of conclusions of law.

Not every cause of action belonging to a corporation may be enforced by a stockholder (*Corbus v. Gold Mining Co.*, 187 U. S. 455, 463). The stockholder must make a special showing (*Harves v. Oakland*, *supra*, 104 U. S. at p. 460). Where, as here, the appellant's interest is trivial (less than \$50, see footnote 1 *ante*), the stockholder "should show a clear case by distinct affirmative allegations" (Pitney, V. C., in *Trimble v. American Sugar-Refining Co.*, *supra*, 61 N. J. Eq. 340, 48 A. 912, at 914. Accord: *Weinberger v. Quinn*, *supra*, 264 App. Div. 405; 35 N. Y. S. (2d) 567 (Aff. without opinion 209 N. Y. 635, 49 N. E. (2d) 131)).

It seems patent that the clear showing required of the stockholder cannot be made by the use of conclusions of law and vague and indefinite recitals. Such was the

holding of the courts, state and Federal, prior to the adoption of the new rules, and there is no reason to believe that the rules have made any change in that regard.

Except where a complaint is to be used as a basis for obtaining a preliminary injunction (Rule 65(b)), the only provision in the new rules requiring a verified complaint is in stockholder actions (Rule 23(b)). To permit a stockholder to state a claim by the use of conclusions of law and vague and indefinite recitals would make a dead letter of the provision of Rule 23(b) requiring that the complaint be verified.

The reason given in support of the view that a "notice pleading" is all that is required under the new rules and that the plaintiff may give such notice by the use of conclusions of law is the fact that other procedures, such as a motion for a more definite statement, pre-trial procedure, and the enlarged use of depositions, is more precisely adapted to the purpose formerly supplied by pleadings under the codes (see *Columbia Law Review* article, quoted at p. 45 of appellant's brief; see also quotations from various cases appearing in appellant's brief, top of p. 52, top of p. 56 and bottom of p. 58). The appellees herein did use "the familiar motions for certainty" (38 *Columbia Law Review*, 1179, quoted Br. p. 45). While the court did not in so many words grant these motions, it did make rulings responsive to many of the items therein contained.³⁵

³⁵Compare *Sheehan v. Municipal Light & Power Co.* (D.C., N. Y.), 1 F. R. D. 70, 71, holding that a motion for a more definite statement is a proper method for obtaining the particulars upon which the pleader bases his conclusions of law.

In a stockholder's action where the plaintiff is suing derivatively in the right of the corporation, the issues cannot be narrowed or the nature of the stockholder's claims revealed by depositions or pre-trial procedure. The stockholder plaintiff usually has little personal knowledge of the matters complained of.³⁶ Depositions of the corporation's officers do not constitute admissions binding on the plaintiff because one of the bases of plaintiff's action is that the corporation is in the control of the individual defendants.³⁷

It seems certain therefore that under the new rules conclusions of law and vague and indefinite recitals are not permitted, particularly in a stockholder's complaint.

Not only is this action a stockholder's action, but appellant's claim is grounded upon charges of fraud and illegality. Rule 9(b) provides that:

"In all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity."

This sentence of Rule 9(b) introduces no new rule. It has been a widely expressed principle that fraud must be pleaded by allegations of specific facts.

1 *Edmunds, Federal Rules of Civil Procedure*, p. 432;

4 *Cyclopedia of Federal Procedure* (2d ed.), pp. 652-658, Secs. 1339-1341.

³⁶All the charges in the Second Amended Complaint herein are made on information and belief [R. 143].

³⁷Compare par. XXI of the Second Amended Complaint [R. 156-157].

It should be observed that the provision of Section 426 of the California Code of Civil Procedure, that the complaint should contain a statement of the facts "in ordinary and concise language", has never been thought to excuse the pleading of fraud with particularity.

Hershey v. Reclamation District No. 108, 200 Cal. 550, 561, 254 Pac. 542.

Compare:

Smith v. Stone, 21 Wyo. 62, 128 Pac. 612, 616 (a stockholder's derivative action);

Pritchard v. Myers, 174 Md. 66, 197 Atl. 620, 623 (a creditor's derivative action).

In *Hershey v. Reclamation District*, *supra*, the Supreme Court of California said:

"Fraud is never to be presumed, but it must be affirmatively pleaded and proved, or the facts from which it is to be inferred must be of such character that no other reasonable conclusion may be reached but the single one of evil design on the part of the person or entity whose acts are attempted to be impugned."

200 Cal. 561.

The presumption against fraud approximates in strength that of innocence of crime.

Truett v. Onderdonk, 120 Cal. 581, 588, 53 Pac. 26.

But considered under a system of pleading most "liberal" to the plaintiff the Second Amended Complaint herein did not afford appellees a fair notice. To make

this plain we will consider briefly each of the five causes of action in the Second Amended Complaint.

1. First Cause of Action—Recovery of payments under the salary agreement. The validity of agreements providing for incentive compensation is well settled (*Church v. Harnit, supra* (C. C. A. 6), 35 F. (2d) 499, 501). What facts took the salary agreement with Bancitaly Corporation out of the general rule and made it “pretended, fraudulent and fictitious” [R. 162, 163]? One corporation, acting through its board of directors, may absorb and take over the stock of a second corporation, and if it does so the liabilities of the second corporation are not affected. What facts take this case out of the general rule? One corporation may purchase all the assets of a second corporation and as a part of the transaction assume the second corporation’s liabilities. If it does so the purchasing corporation may not retain the assets and yet denounce the obligations as invalid (*Matthews v. Ormerd, supra*, 140 Cal. 578, 583, 74 Pac. 136; *Patten v. Pepper Hotel Co., supra*, 153 Cal. 460, 467, 96 Pac. 296). What are the facts which take this case out of the ordinary rule and permit a stockholder suing in behalf of Transamerica to denounce the salary agreement as “pretended, fraudulent and fictitious” [R. 162]? It is claimed that the profits of Bancitaly Corporation upon which the credits under the salary agreement were computed were false, fictitious, unearned and unrealized. Upon what facts are these general statements based?

2. Second Cause of Action—Recovery of brokerage fees and money for use as capital advanced to Walston & Co. It should be observed that this cause of action

is not for the recovery of "secret" profits. Appellant seeks judgment in favor of Transamerica for the return of the precise amount specified as having been paid by Transamerica or its subsidiaries as brokerage fees to Walston & Co. and also moneys advanced to that firm for use as capital. What facts made the act of the Board of Directors of Transamerica in discontinuing its brokerage business and using the services of Walston & Co. "without legal right or authority" [R. 170]? There is no allegation in the Second Amended Complaint like the allegation appearing in the original complaint [R. 17] that the fees were excessive. In respect to the recovery of moneys advanced to Walston & Co., as working capital what are the facts that authorize a plaintiff to institute an action in behalf of Transamerica for the recovery of these moneys? There are no allegations that Walston & Co. are about to become insolvent or that the recovery of the indebtedness is about to outlaw.

3 and 4. Third Cause of Action—Recovery of profits "earned and collected" by Pacific Coast Mortgage Company; and Fourth Cause of Action—Recovery of profits "earned and collected" by Mallory-Smith Syndicate. What facts made the loans and advances mentioned in these two causes of action without legal right or authority [R. 174, 175, 178]? Appellant is not here seeking the recovery of the moneys advanced by Transamerica and its subsidiaries in either transaction, for her allegations of damages have no relation to these sums. It would appear that appellant is claiming for Transamerica the alleged profits "earned and collected" by Pacific Coast Mortgage Company and the Mallory-Smith Syndicate, respectively, by trading on the market in shares of Transamerica stock

“and other stocks and securities” [R. 177 and 180] because the money used as capital was borrowed from Transamerica and its subsidiaries.

5. The fifth cause of action—expenditure of corporate funds in “manipulating and stirring the market” (*i. e.*, soliciting orders from the general public for the purchase of Transamerica stock). It appears from the Second Amended Complaint that among the “subsidiaries” of Transamerica were Bank of America National Trust and Savings Association, Occidental Life Insurance Company and Pacific National Fire Insurance Company [R. 144-145]. A widespread holding of Transamerica stock by small purchasers might enhance the good will of the bank and the insurance companies and bring new depositors to the bank and new policyholders to the insurance companies. What are the facts that make the act of the directors “without legal right or authority” [R. 181]? How are Transamerica and its subsidiaries irremediably damaged and injured by such “losses” [R. 181]? What are the facts that authorize plaintiff to substitute her judgment for that of the directors in a matter peculiarly within the discretion of the board and not *ultra vires* as to the corporation (compare *Corbus v. Gold Mining Co.*, 187 U. S. 455, 463)?

The Second Amended Complaint, by the use of conclusions of law and general, vague and indefinite recitals, failed to state a claim upon which relief could be granted. It failed to give appellees fair notice of the nature of appellant’s claims.

The trial court was correct in ruling that the Second Amended Complaint was indefinite in major particulars [R. 358-360] and that before it could be held to have

stated a claim against appellees or any of them additional facts would have to be alleged [R. 358].

The order of the trial court granting appellees' motions to dismiss for failure to state a claim was correct. Appellant's failure within the allotted time to request permission to file a third amended pleading warranted the judgment of dismissal.

VI.

Appellant's Contention That, in Passing on the Statute of Limitations, the Trial Court Considered as Evidence Matters Dehors the Second Amended Complaint Is Without Support in the Record.

(Answering appellant's Part Five, Br. pp. 112-120).

Appellant, in Part Five (Br. pp. 112-120) cites a number of cases holding that a motion to dismiss admits all facts well pleaded and that the averments of the complaint must be accepted as true (Br. pp. 112-116). It is argued that this rule, which is well settled, was violated by the trial court thereby constituting reversible error (Br. p. 116).

Specifically, appellant asserts (Br. p. 116) that the record discloses that the court in considering and deciding appellees' motions to dismiss considered the affidavit of Hector Campana [R. 271-273], including the letter of December 9, 1931, Exhibit A thereto [R. 274-281], the affidavit of Edmund Nelson, Esq. [R. 269-270], and a letter from the attorneys for appellee, A. P. Giannini [R. 362-366], enclosing photostatic copies of the minutes of the Board of Directors of Transamerica for their meeting of December 9, 1931 [R. 266-416]. Counsel says that it is obvious that the foregoing documents were by the appellees

intended and by the District Court considered as evidence showing that appellant in December, 1931, received said letter of December 9, 1931, and acquired knowledge concerning the salary agreement, thereby starting the running of the statute of limitations (Br. p. 116). It is contended that upon the trial of the merits appellant would be entitled to cross-examine witnesses concerning the circumstances surrounding the transactions mentioned in these documents and had the right to deny the receipt of the letter of December 9, 1931 (Br. p. 117).

The contents of the papers referred to have been given in the statement of facts (*ante*, pp. 20-22) and need not here be repeated.

We have already pointed out in the argument under Point II, that the Campana affidavit was properly submitted in support of appellee's contention that a separate statement of claims founded on separate transactions would facilitate a clear presentation thereof (*ante*, p. 56). The papers referred to were likewise material in support of one of the grounds of the motions to dismiss made by all appellees except Elkus *et al.*, namely, that the Second Amended Complaint was sham and evasive (ground f [R. 194-195], ground 6 [R. 219], ground 7 [R. 239], ground f [R. 257], ground f [R. 297-298]), and in support of motions made by all the appellees except Elkus *et al.*, and Bank of America, etc., as administrator, to strike the entire Second Amended Complaint on the same ground [R. 213-214, 233-234, 266, 316].

Appellant in asserting that "The record in this case discloses" (Br. p. 116) that the court considered these documents in deciding the motions to dismiss does not cite any record reference. Nothing contained in the

District Court's opinion [R. 321-360] or elsewhere indicates, much less discloses, that the court considered the affidavits or the letter or the photostatic copies of the minutes of the Board of Directors for Transamerica as establishing the facts therein contained. The court did not grant the motion to dismiss the Second Amended Complaint upon the ground that the complaint was sham or frivolous nor did it grant the motion, made on the same grounds, to strike the entire Second Amended Complaint [R. 320].

There is no presumption that the court considered these papers as establishing the facts therein contained. (12 *Cyc. of Fed. Proc.* (2nd Ed.), p. 224, Note 7; *Abell v. State*, 109 Tex. Cr. App. 380, 5 S. W. (2d) 139, 141.) The presumptions are all to the contrary. (3 *Am. Juris.*, Sec. 924, pp. 490, 491; Sec. 933, p. 500.)

If the trial court had considered that the affidavits established the facts therein appearing it is quite unlikely that the court would have permitted appellant to apply for leave to file a third amended pleading [R. 320] as to appellee Bacigalupi, who had signed the letter of December 9, 1931 [R. 281], or as to other old directors who had ceased to be such in that year. At least as far as these appellees were concerned the letter constituted an effective "withdrawal" from the alleged conspiracy even within the strict rule of criminal conspiracies stated in *Eldredge v. U. S.*, 62 F. (2d) 449, 459, quoted in appellant's brief, page 105.

Moreover, counsel for appellee A. P. Giannini, with the acquiescence of counsel for all the other appellees, conceded appellant's right to deny receipt of this letter [R. 481-482]. It is quite unlikely that the trial court in the face of this concession would have considered these papers as overcoming this denial.

Appellant also contends in her Part Five that the court considered some of the statements set forth in the order of the Securities and Exchange Commission as “established facts” which started the running of the statute of limitations or required the application of the doctrine of laches as a bar to the further prosecution of plaintiff’s action (Br. p. 117). As we have shown under Point III (*ante*, p. 78), the court did not consider the statements contained in said order as establishing any fact but merely as showing the extent of appellant’s discovery. This order was referred to in the Second Amended Complaint [R. 185] and was submitted to the court by appellant herself. On this phase of the controversy appellant is bound by the decision of this court in *Hewitt v. Great Western Beet Sugar Co.*, *supra*, 230 F. 394. In the case cited the court said:

“The appellant contends that the question whether his bill presents ground for equitable relief must be determined from the facts alleged in the body of the bill, and that recourse may not be had to the proceedings in the state courts of Idaho to determine what was at issue and what was decided therein. But it seems too clear to require discussion that when the appellant comes into a federal court of equity seeking to set aside a judgment of a state court, and in his bill he describes the suit in the state court, the parties thereto, and the issues involved, and sets forth the date of the judgment and the volume and page of the Reports wherein it is reported, he authorizes the court to advert to the reported decision and to read the same in connection with the allegations of his bill, with the same effect as if a copy thereof had been appended as an exhibit to his bill. The court in doing so does not, as suggested by the appellant, take judi-

cial notice of a proceeding of a state court, but takes notice of that which is brought to its attention by proper pleading.”

230 F. 398.

Appellant's contention that the court considered as evidence matters dehors the Second Amended Complaint is without merit.

Conclusion.

The record discloses that the infirmities of the First Amended Complaint appeared again in the Second Amended Complaint. The record also discloses that these infirmities were the subject of extended colloquy among the court and the various counsel and that it was definitely decided and agreed that the separate claims should and would be stated separately. After analysis and extended discussion of the First Amended Complaint, followed by direction of the court that the complaint be separated into counts, counsel for appellant specifically stated:

“Now, as I said before, we have no objection to separating our complaint into counts on the various statements of the claims * * *” [R. 473].

Again, following presentation of motions, argument and discussion in open court respecting this same infirmity repeated in the Second Amended Complaint, counsel for appellant states:

“Now, if Your Honor thinks that a suit against fiduciaries under the circumstances of this complaint, or any one who does them, is more than one cause of action or more than one claim, *I again say* we will separate it” [R. 480].

Considered in the light of the record just cited, the suggestion to this court of counsel for appellant, found on the last page and in the last sentence but one of their brief (Br. p. 122) that counsel does not claim perfection for the pleading “and is quite willing, if properly advised, to make any corrections of form which may be required, but on the other hand is unwilling to basically change the legal theory to one which does not give the complete relief to which the shareholders * * * are entitled * * *” is a surprising admission. Counsel had been “properly advised” and in fact had been twice “properly advised.” Counsel admit as much in the statement made following argument and discussion of the Second Amended Complaint when they say “I again say we will separate it” [R. 480].

We do not understand that appellant on this appeal is entitled to an advisory opinion or declaratory relief. Counsel for appellant were twice directed by the trial court to separate their causes of action, twice agreed to do so and twice failed to comply. In effect, what appellant now asks is that this court set aside the judgment of the trial court to the end that counsel for appellant may now embrace an opportunity twice rejected.

The statement of counsel for appellant that they are “unwilling to basically change the legal theory * * *” (Br. p. 122) has no persuasive effect on the matter of separate statement of causes of action, for the reason that there would be no change, basic or otherwise, in the legal theory of the complaint by stating the separate claims in separate counts or causes of action. The theory upon which recovery is sought would be identical in each instance.

The conclusion of the trial court that "before it can be determined any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her Second Amended Complaint" [R. 358] would not have required a change in appellant's theory.

For appellant to have made the corporate subsidiaries parties would not have resulted in a basic change in the legal theory of the action, although it necessitated an abandonment of appellant's untenable theory that a stockholder may recover judgment in favor of a parent corporation upon choses in action belonging to the corporate subsidiaries in an action in which the subsidiaries are not parties.

Neither would the requirement of the court that appellant accompany her allegations of fraud and wrongdoing with allegations of ultimate facts rather than vague and indefinite recitals and conclusions of law require a basic change in legal theory. The ruling required an allegation of ultimate facts as distinguished from an allegation of conclusions based upon ultimate facts. Compliance with this requirement in no manner would change the theory of fraud and wrongdoing upon which the complaint proceeded. Appellant after repeated, extended hearings in open court and upon written briefs, during which the defects of her pleadings were definitely pointed out, fully discussed and considered, concluded to reject the direction of the trial court and to stand upon a pleading which in open court appellant had twice agreed to amend. It would appear that through the process of appeal appellant is limited to the establishment of reversible error occurring in the trial court. That no such error has occurred we

believe is definitely established by the record and perhaps by implication, in the closing paragraphs of appellant's brief, where willingness is expressed "if properly advised" to make corrections in the form of the pleading.

Appellant should have stated the five claims founded upon separate and distinct transactions in five separate counts, as directed by the court, and the trial court was justified in granting the motions to dismiss because of appellant's failure to do so. Each of the causes of action is barred by the statute of limitations and by laches. The corporate subsidiaries of Transamerica were indispensable parties and the Second Amended Complaint was defective in failing to join them. The said complaint failed to state a claim against any of the appellees and was indefinite in the particulars specified by the court. The authorities we have cited and the arguments above advanced amply support the order of the trial court granting the motions to dismiss. Appellant having failed to submit a Third Amended Complaint within the time allowed by the court, the judgment of dismissal was proper and should be affirmed.

Respectfully submitted,

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APPENDIX.

California Civil Code, section 375 (added Stats. 1943, Chap. 934, sec. 1):

"Sec. 375. [Suit against director, officer or employee : Assessment of expenses or indemnity.]

[*Assessment of expenses against corporation or representative.*] If any person, either alone or with others, is sued in any action or proceeding, by reason of his being or having been a director, officer or employee of a corporation, domestic or foreign, and arising out of his alleged misfeasance or non-feasance in the performance of his duties or out of any alleged wrongful act against the corporation or by the corporation, whether such action or proceeding is brought by the corporation or by one or more shareholders or creditors or the receiver or trustee of the corporation, any governmental body, any public official or any private person or corporation, the reasonable expenses, including attorneys' fees of any said director, officer or employee, incurred in the successful defense of such action or proceeding, whether now pending or commenced hereafter, may be assessed against the corporation or its representative either by the court in which such action or proceeding is brought or by the court in a separate action or proceeding against the corporation or its representative.

[*Assessment of indemnity where defendant is successful or action is settled.*] If any director, officer or employee is successful in whole or in part, or if the action or proceeding against him is settled with the approval of the court, and if the court also finds that the conduct of any such party is such as fairly

and equitably to merit such indemnity, reasonable expenses, including attorneys' fees, of any or all such parties may be assessed against the corporation in such amount as the court determines and finds to be reasonable, either in the same action or proceeding or in a separate action or proceeding against the corporation or its representative.

[*Notice of application for indemnity: Service: Form: Who may make application: Direction as to payment.*] Notice of the application for indemnity for such expenses shall be served upon the corporation or its representative and upon the plaintiff and other parties in the action or proceeding. Notice may be given either personally or by mail or other written communication to the shareholders in the manner provided by Section 314 of the Civil Code with respect to shareholders' meetings, in such form as the court may direct. Application for indemnity for such expenses may be made either by one of the parties litigant or by the attorney or other person rendering services to him and the court may direct fees and expenses to be paid direct to the attorney or other person rendering service to the party litigant, although not himself a party to the action.

[*Award to be by court order: Rights and remedies exclusive.*] The awarding of indemnity for expenses, including attorneys' fees, to the parties to any such action or proceeding, whether terminated by trial on the merits or by settlement or dismissal, shall be by order of the court and shall not be governed by any provision in the articles of incorporation or by-laws of the corporation or by resolution or agreement of the corporation, its directors or shareholders, but the rights and remedy given by this section are hereby declared exclusive."

Excerpt from *Bowman v. Wohlke*, 166 Cal. 121 at 124-126:

“From what we have said it is apparent that in both the original and amended complaints were united claims for injuries to character, to person, and to property. The same were not ‘separately stated.’ Of course, in view of our statutory provisions, causes of action for injuries to property may not be united in one action with causes of action for injuries to the person or character. (See Code Civ. Proc., sec. 427.) And where causes of action may be united they must be separately stated. (*Id*) The theory of counsel for plaintiffs is that by reason of the claim that all the acts were done in pursuance of a conspiracy, we have but a single cause of action stated in the complaint, a cause of action for damages for ‘conspiracy,’ and that any variety of wrongful acts, whether ordinarily capable of being united in a single action or not, may be so united if done in pursuance of a conspiracy. We are satisfied that this theory is irreconcilable with well settled rules of law, and cannot be upheld. As early as 1864 this court said in *Herron v. Hughes*, 25 Cal. 560: ‘A simple conspiracy, however atrocious, unless it results in actual damage to the party, never was the subject of a civil action; and though such conspiracy is charged, the averment is immaterial and need not be proved. Where two or more are sued for a wrong done, it may be necessary to prove previous combination in order to secure a joint recovery, but it is never necessary to allege it, and if alleged it is not to be considered as of the gist of the action. That lies in the wrongful and damaging act done.’ In *Davitt v. Bakers’ Union*, 124 Cal. 99, [56 Pac. 775], it is said that ‘a conspiracy, however atrocious its purpose, is not the subject of a civil action.’ In

Dowdell v. Carpy, 129 Cal. 168, [61 Pac. 948], where the act complained of as being done in pursuance of a conspiracy was an alleged malicious prosecution, it was said that 'the gravamen of the action is the alleged malicious prosecution,' with its consequent injury to the plaintiff, and the language of *Dreaux v. Domec*, 18 Cal. 83, relied on by respondents as intimating differently, was declared, if capable of the construction claimed, to be 'against all the authorities.' In *More v. Finger*, 128 Cal. 313, [60 Pac. 933], a case cited by respondents, it is said: 'The complaint alleges that the plaintiff has been deprived of the note by the wrongful acts of the defendants, and that they entered into a conspiracy for that purpose, but the conspiracy thus alleged is not the gist of the action. The gist of the action is the injury done to the plaintiff by these wrongful acts and this injury is actionable whether it is the result of a conspiracy or not. The averment of a conspiracy is immaterial, and could be proved without such averment, or, if averred, need not be proved. The plaintiff is entitled to relief for the injury from such of the defendants as she can show have united or cooperated in doing her the wrong.' These statements are in full accord with the authorities everywhere. For instance, in 1 Cooley on Torts (3d ed.), p. 210, it is said: 'The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. The damage is the gist of the action, not the conspiracy.' In *Green v. Davies*, 182 N. Y. 503, [3 Ann. Cas. 310, 75 N. E. 537], it is said: 'While it is true that in a criminal prosecution for conspiracy the unlawful combination and confederacy are the gist of the offense, not the overt acts done in pursuance thereof, . . .

the doctrine does not apply to civil suits for actionable torts.' (See, also, *Huntley v. Louisville etc. R. R. Co.*, 105 Ky. 162, [88 Am. St. Rep. 298, 63 L. R. A. 289, 48 S. W. 429]; *Jenner v. Carson*, 111 Ind. 522, [13 N. E. 44]; *Doremus v. Hennessy*, 62 Ill. App. 391; *Marten v. Holbrook*, 157 Fed. 717; 6 Am. & Eng. Ency. of Law (2d ed.) 873; 8 Cyc. 647.) In *Jenner v. Carson*, 111 Ind. 522, [13 N. E. 44], it was said that the allegation of a conspiracy in a civil action against several for a tort is of no consequence, so far as respects the cause and ground of action, unless the wrong complained of would not have been actionable at all, but for the unlawful combination of several persons; and that damage is the gist of an action for a tort, not the conspiracy. The same idea is expressed in *Green v. Davies*, 182 N. Y. 499, [3 Ann. Cas. 310, 75 N. E. 536], where it is said: 'There may be cases where acts committed in pursuance of a *combination* of a number of persons to injure a third person are actionable, while the same acts, if done by a single individual, acting without such concert, would not be actionable. Such cases may be termed actions for conspiracy, but where the conspiracy results in the commission of that which would be an actionable tort, whether committed by one or by many, then the cause of action is the tort, not the conspiracy.' In such cases it has been said that 'the allegation and proofs of a conspiracy in an action of this character is only important to connect a defendant with a transaction and to charge him with the acts and declarations of his co-conspirators, where otherwise he could not have been implicated.' (*Brackett v. Griswold*, 112 N. Y. 454, [20 N. E. 376]. See, also, 8 Cyc. 647; *Doremus v. Hennessy*, 62 Ill. App. 391.) The effect of this well-settled doctrine in so far as the case before us is concerned

is clear. The complaint alleged various causes of action for different torts, all committed, it is true, in pursuance of a single conspiracy, but each, nevertheless, giving rise to a separate cause of action for the injury caused by the particular wrongful act. Whether or not the various causes of action could properly be united depended on our statutes relating to the joinder of causes of action in one complaint. A similar question to the one we are considering was presented in the case of *Green v. Davies*, 182 N. Y. 499, [3 Ann. Cas. 310, 75 N. E. 536], hereinbefore cited, where, upon the theory that a single cause of action for damages for a conspiracy was being stated, various wrongful acts, each constituting a tort, were alleged in the complaint, when, under the statutes of the state, causes of action for the various torts alleged could not be united in one complaint. The action of the trial court in overruling a demurrer on the ground of improper joinder was reversed, without any dissent. The opinion contains a very clear discussion of the doctrine we have stated, and holds that the theory that the action was not for slander or malicious prosecution, but for conspiracy to injure the plaintiff, of which the slander and arrest were merely the overt acts done in execution of the conspiracy, was opposed to the decisions and cannot be upheld. To use the words of another New York opinion, such a complaint does not show 'a single, indivisible wrong, for which an action will lie,' but 'an aggregation of certain tortious acts, for each of which a separate action will lie for the recovery of the damages flowing therefrom.' (See *Kolel v. Eliach*, 29 Misc. Rep. 503, [61 N. Y. Supp. 937].) We find nothing in any of the authorities cited by counsel for respondents to cause us to doubt the correctness of the views we have expressed."

[TITLE OF COURT AND CAUSE.]

MEMORANDUM OF CONCLUSIONS, JUDGE HOLLZER'S
CALENDAR.

[R. pp. 321-360.]

The present case constitutes what is generally designated as a stockholder's derivative suit. Plaintiff is the owner of a small number of shares of the corporate defendant named Transamerica Corporation, hereinafter referred to as Transamerica. The number of defendants is quite large, totalling eighty-one in all. Of these forty-six are sued by their true names, one being designated in four different capacities, and two others being each sued in two different capacities. The remaining thirty-five defendants are designated under fictitious names.

The matters discussed herein arise upon several motions which various groups of defendants have interposed against the second amended complaint. Each group of defendants has filed a motion to dismiss, a motion to separately state causes of action in separate counts, a motion for a more definite statement or for a bill of particulars, and a motion to strike the entire complaint. In addition, certain of these defendants have filed a motion to strike out certain designated portions of the complaint.

This second amended complaint was filed by leave of court, granted at the close of quite an extended oral argument upon substantially similar motions directed against a first amended complaint. A clearer understanding of the legal questions requiring determination will be afforded by referring to certain portions of the discussion which took place during the aforementioned oral argument, when the first amended complaint was under attack. Upon that

occasion, it was pointed out that in said earlier complaint plaintiff had set forth in one and the same count allegations to the effect that as the result of sundry separate and distinct transactions, frauds had been perpetrated against Transamerica. Respecting such former pleading it was argued that one of the transactions therein complained of was alleged to have arisen out of a certain salary contract entered into prior to the organization of Transamerica between one of the defendants and a previously formed corporation and was described as involving the fraudulent disbursement of the funds of such earlier corporation pursuant to the terms of said contract; that another of the transactions there attacked was described as involving a fraud whereby Transamerica had assumed the liabilities of said earlier corporation, including the obligations of said contract and pursuant to the terms thereof had fraudulently disbursed various sums out of its own funds to the same defendant during a period both antedating the organization of Transamerica and also extending during approximately the first year of its existence; that a third transaction there complained of was described as involving a fraud whereby during a still later period and under the terms of the last mentioned contract Transamerica had improperly disbursed additional sums out of its own funds to the same defendant; that still a further transaction there complained of was described as involving a fraud whereby, during the years 1932 to 1938, inclusive, three of the defendants together with another individual who had died prior to the commencement of this suit, and whose personal representative was included as a co-defendant, had caused a certain co-partnership to be organized, under the name of Walston & Co., which partnership had been

composed of eight of the defendants together with said decedent—and whereby two of the aforementioned partner defendants had caused, and the co-defendant directors of Transamerica knowingly had permitted, Transamerica to divert all of the latter's security brokerage business to said co-partnership and to pay from its funds substantial sums as brokerage fees for services with respect to brokerage business so diverted and also to pay other substantial sums for use as capital for said co-partnership, all of which sums were divided among the aforementioned three defendants and said fourth person, since deceased; that yet another transaction there complained of was described as a fraud whereby two of the aforementioned defendants together with a third person since deceased, whose personal representative was included as a co-defendant, caused Transamerica to advance large sums of money to them, which sums had been used by them to acquire the controlling interest in the capital stock of a certain corporation and for the further purpose of enabling the latter corporation to engage in speculative stock operations, that such operations had been carried on during the years 1933 to 1936, inclusive, resulting in large profits to said corporation and which profits were paid to the aforementioned two defendants and said third person since deceased; that again still another transaction there complained of was described as a fraud whereby the aforementioned two defendants and said third person since deceased had organized a certain secret trust syndicate referred to as the Mallory and Smith trust, that said two defendants had caused, and the co-defendant directors of Transamerica knowingly had permitted, Transamerica to advance large sums to said trust syndicate which had employed the same for specula-

tive stock operations resulting in substantial profits, which in turn had been paid to two said defendants and said third person since deceased during the years 1933, 1934 and 1935; and that finally yet another transaction there complained of was described as a fraud whereby the aforementioned two defendants caused Transamerica to expend large sums of money in repayment of substantial losses and expenses incurred in connection with said speculative stock operations.

During the course of the aforementioned argument the court commented in part as follows:

“For example * * * I see no basis upon which any decision relative to the so-called contract, salary contract transaction, will have the slightest bearing in determining the legality or illegality of the so-called Walston and Company venture, and vice versa.”

The court further pointed out that in the first amended complaint the plaintiff had charged that several separate and distinct ventures were illegal and had caused detriment to Transamerica and its stockholders. Another observation on the part of the court was to the effect that plaintiff should be allowed to file another amended bill, wherein some of the transactions complained of might be segregated into different counts.

Toward the close of that argument, and in reply to the court's suggestion to the effect that such matters as the so-called salary transaction, the Walston & Company transaction and the Mallory Trust transaction be treated in separate counts, plaintiff's counsel at first indicated that he would like to present a further memorandum on that point.

During this same discussion opposing counsel urged that an inspection of the minutes and other corporate records of Transamerica would disclose that during the latter part of 1931 and the early part of 1932 a majority of the board of directors of Transamerica were hostile to those particular defendants who were charged in the complaint as being the instigators of and the principals in the various allegedly fraudulent transactions complained of and had taken affirmative action against those defendants. Hence they pointed out that in view of such facts it would ultimately be incumbent upon plaintiff to overcome the charge that the present suit is barred by laches. Accordingly, they argued that in view of the great length of time which had elapsed, the fact that most of the defendants had ceased to be directors of Transamerica for many years past, the further circumstance that two of the so-called principal defendants were dead, and likewise since plaintiff's counsel conceded that if this case were brought to trial it would entail bitterly contested, protracted hearings wherein the evidence would consist mainly of the conflicting testimony of witnesses relying almost solely upon their recollection of incidents that had occurred many years ago, it was fair and proper that the complaint disclose fully the essential facts pertaining to the question of laches in order that that issue might be settled at the very threshold of the litigation.

To the latter contention plaintiff's counsel responded in substance that while he agreed with the same in principle he was not then prepared to say how he would treat this point in a complaint.

Somewhat later in the argument plaintiff's counsel stated:

"Now, as I said before, we have no objection to separating our complaint into counts on the various statements of the claims, but it occurs to me that in doing it we should have the advantage of knowing just what the court's decision is on the other questions, * * *

In explanation of what was meant by the expression, "other questions", counsel added that he referred principally to the contention made on behalf of the defendants to the effect that the complaint failed to allege facts sufficient to relieve the plaintiff from the necessity of appealing to the stockholders to secure action on behalf of Transamerica before filing the present lawsuit. Whereupon the court announced that its ruling upon that point would be reserved until after the filing of a further amended complaint, and that while the court's tentative view then was that this contention was not sound, nevertheless, there was no reason why in such further amended pleading the plaintiff should not include anything she desired to add in justification for not appealing to the stockholders.

The minutes of the court disclose that at the conclusion of that oral argument an entry was made reading as follows:

"The court makes a statement re its present views. It is ordered that the plaintiff serve and file an amended complaint within sixty (60) days and that the defendants have thirty (30) days thereafter to plead thereto."

Thereafter plaintiff filed a second amended complaint together with a memorandum of points and authorities in

support thereof. Just as in the case of the previous complaint, plaintiff has incorporated all of the matters complained of in a single count.

In justification of this type of pleading plaintiff's counsel, during the oral argument upon the pending motions, asserted that subsequent to the entry of the order granting leave to file a second amended complaint certain matters had come to their attention which had induced them to adopt a different legal theory respecting this litigation, and it was accordingly upon this new theory that the present complaint had been drawn. Such different theory, counsel explained was to the following effect.

The first amended complaint was based upon the proposition that two of the defendants and a third person since deceased (whose legal representative was joined as a defendant) had conspired to acquire control of Transamerica and its affairs, that pursuant to such conspiracy, they had selected its directors, dominated its affairs and caused its directors to commit various breaches of their trust or fiduciary obligations and that in furtherance of such conspiracy various overt acts had been committed at the time, in the manner and in the particulars therein pleaded, causing damages to Transamerica in the respective amounts therein alleged. On the other hand, the second amended complaint was prepared upon the theory that all of the persons who at any time had served as directors of Transamerica had conspired to commit the aforementioned breaches of their trust or fiduciary obligations, that in furtherance of such conspiracy certain overt acts had been committed at the times, in the manner and in the particulars therein pleaded, causing damages to Transamerica, its subsidiaries and departments in the respective amounts

therein alleged, and that such of the defendants as had never served as directors were joined upon the theory that they had aided their co-defendants in committing one or more of the alleged breaches of trust.

It is the contention of plaintiff's counsel that but a single conspiracy has been pleaded in the second amended complaint; that all of those directors and any others who at any time allegedly entered such conspiracy are equally liable regardless when, if at all, they served as directors of Transamerica; also, that it is immaterial when the different alleged overt acts were committed or when damages resulted therefrom; and that even though it may be pleaded that different defendants, acting either as directors or otherwise, entered the alleged conspiracy at different times, nevertheless, according to the allegations of said complaint they are charged with having adopted the entire, single, illegal scheme, and hence all defendants are equally liable for all wrongs committed, including not only those perpetrated before they became directors or before they otherwise aided the alleged conspiracy, but also for all the various wrongs asserted to have been committed after they had ceased to be directors of Transamerica, or otherwise had terminated their connection with the enterprises claimed to have been involved with said conspiracy.

Examining the second amended complaint, it will be observed that the first eighteen paragraphs consist of more or less proforma recitals either identifying the parties to the litigation or otherwise pleading the matters which would entitle this court to take jurisdiction of the cause.

Paragraph XIX in substance charges that on or about October 11, 1928, all the defendants, including those particular individual defendants who at any time served as

directors of Transamerica, together with the two former directors who had died prior to the commencement of the suit, and in addition the forty-four other persons not sued as defendants but who at one time or another had also served as directors, conspired to control, operate and use Transamerica, its subsidiaries and departments, for their own benefit, by wrongfully appropriating its assets and otherwise using their official positions with Transamerica, and the confidential and special knowledge gained thereby, to the detriment of the latter corporation, its subsidiaries, etc. It is further alleged in the same paragraph that as a part of said conspiracy the defendants had said other persons not sued confederated to obtain and maintain control of the outstanding voting shares, also to select and dominate the members of all its boards of directors and all its principal officers, that in addition the defendants and said other persons conspired that, in the event any persons elected as such directors were not members of said conspiracy, they would at all times be entirely dominated by the defendants and said other persons to the extent that such other directors would be the dummies of the defendants and said other persons, and in the performance of their official duties would exercise no independent judgment, but would respond entirely to the will of the defendants and said other persons; and also that in the event that the defendants and said other persons for any period of time should fail to maintain control of the voting shares of Transamerica and of the election of its directors, nevertheless, said conspiracy would not terminate but that the defendants and said other persons would attempt to regain control of such voting stock, and if successful then said conspiracy would continue indefinitely.

In paragraphs XX to XL, inclusive, it is alleged that from time to time during a period covering many years the defendants and said other persons engaged in a series of transactions for the purpose of effecting the objects of said conspiracy. Particularly, it is charged in paragraph XXI that during all times mentioned in the second amended complaint up to the filing thereof, the defendants and said other persons obtained and exercised exclusive control of all the outstanding voting shares of stock of Transamerica and thereby elected all members of its several Boards of Directors and controlled and dominated its business policies and affairs.

Paragraph XXII discloses that through such stock control, of the forty-six designated by their true names, thirty-three defendants served at one time or another during the period involved herein as directors of Transamerica. Two others of such forty-six have been sued as the legal representatives of decedents who also at one time had been directors of that corporation. None of the remaining defendants appears ever to have held such position or otherwise to have been officially connected with that corporation.

Of the aforementioned thirty-three, sixteen had ceased to be directors by February, 1932, and thereafter had no further official connection with Transamerica, while another remained a director only about two months, namely, from February to April, 1932. At that time, as pointed out in the hereinafter mentioned order of the Securities and Exchange Commission issued in November, 1938, a change took place in the management. Of the remaining sixteen, one was a director only about eleven months, namely, from April, 1932, until March, 1933, another held that position about nineteen months, to-wit, from April,

1932, until November, 1933, while five others served as directors from February or March, 1932, until sometime in 1939, seven have been directors from February or March, 1932, until the filing of this suit, while only two have served in that capacity throughout the entire period involved in this litigation.

In paragraph XXIII there is set forth a list of forty-four other persons, none of whom is sued herein, but all of whom are also alleged to have served at one time or another as directors of Transamerica, and who likewise are described as having been among the co-conspirators. Their election as directors is claimed to have been effected similarly through the aforementioned stock control.

Of these forty-four other persons, it is asserted that one was a director but a single day, to-wit on February 15, 1932, five others held such position barely nine days (February 14 to 24, 1932), two others were directors only nineteen or twenty days (one on March 26, and again from September 4 to September 22, 1931, and the other from April 6, to April 26, 1932), three more served but 27 or 28 days (one from September 4 to October 1, 1931, and the other two on March 26 and again from September 4 to October 1, 1931), also seven others were directors hardly two months (February to April, 1932), eight more acted as such but approximately five months (from about September, 1931 to February, 1932), still another was a director only six months (from March to September, 1931), yet another barely eight months (January 20 to September, 1929), also another served hardly nine months (March to December, 1940), also one was a director but ten months (April, 1932 to February, 1933), yet another was elected to such office only about twenty days prior to

the filing of this suit and held the same approximately one year (March, 1941 to March, 1942), still another held such position barely thirteen months (January 19, 1929 to February, 1930), again two more served as directors only about one year and seven months (one from February, 1930 to September, 1931, and the other from July, 1930 to February, 1932), also another was a director barely one year and eight months (January, 1930 to September, 1931), again two more held such positions approximately two years and one month (January, 1930 to February, 1932), while two others served in that capacity only two years and four months (May, 1929, to September, 1931), still two others were directors barely two years and eight months (January, 1929 to September, 1931), again another served about two years and nine months (May, 1929 to February, 1932) while of the remaining two, one has been a director from March, 1940 to the date of the filing of the present suit and the other has served in such capacity from March, 1932 until the same time.

Thus upon the face of the second amended complaint it appears that during the period involved in this litigation Transamerica and its subsidiaries had been under the management of several different boards of directors.

In paragraphs XXIV and XXV it is asserted that each individual director of Transamerica who did not become a member of said conspiracy was a dummy director and at all times was controlled and dominated by the defendants and said other persons to the extent that in the performance of official duties and in all corporate acts they exercised no independent judgment, but responded to the will of the defendants and said other persons; that likewise such directors of Transamerica who did not become mem-

bers of said conspiracy or serve as dummy directors, either failed to discover any of the wrongful acts complained of, or, having discovered the same, failed at all times and in disregard of official duties, to take action or cause action to be taken to redress or prevent the continuance of such wrongs.

Paragraphs XXVI to XXIX, inclusive, charge in substance that among the overt acts done in carrying out such conspiracy the defendants and said other persons, acting through the board of directors of Transamerica on or about May 25, 1929 caused the latter corporation to acquire all of the capital stock and all of the assets, and also to assume the liabilities, of another corporation known as Bancitaly Corporation; that among such liabilities was a certain salary agreement which in 1927 had been entered into between Bancitaly Corporation and the defendant A. P. Giannini, and which provided that for the services to be rendered by him as president of the latter corporation, beginning January 1, 1927, he should be paid five percent of its net profits per annum with a guaranteed minimum of \$100,000. In that connection said pleading avers that the last named corporation had been operated and controlled by defendants A. P. Giannini, P. C. Hale and James A. Bacigalupi and others not named, and that the aforementioned salary agreement was fraudulent and fictitious. It is further averred that among the liabilities thus assumed were certain allegedly fictitious credit items entered between April 13, 1927 and May 25, 1929 upon the books of the last named corporation in favor of defendants A. P. Giannini and L. M. Giannini and one V. D. Giannini (now deceased) in sums aggregating approximately \$925,000.

It is further stated that acting through the Board of Directors of Transamerica the defendants and said other persons, between April 5, 1929 and the end of that year, caused to be entered on the books of said corporation, its subsidiaries and departments, as liabilities under the provisions of the aforementioned salary agreement, certain allegedly fictitious credits in favor of said last two named defendants and said V. D. Giannini (now deceased), in amounts aggregating not less than \$3,700,000.00. It is also there charged that between April 5, 1929 and January 1, 1939 the defendants and said other persons, acting through their several boards of directors of Transamerica, illegally caused said corporation and its subsidiaries, etc. to pay to said last three named persons, on account of the aforementioned credits, varying amounts aggregating \$3,700,000.00, and that of the latter sum certain particular installments totalling \$1,271,647.01, were paid to said parties in each of the years 1930 to 1939, inclusive.

Here it should be noted that, although according to the complaint Bancitaly Corporation had been owned, dominated and controlled by only three of the defendants, to-wit, Hale, Bacigalupi and A. P. Giannini, up until about May 25, 1929, including the time when the aforementioned salary agreement was entered into, and also the period during which it is claimed that false entries were made upon the basis of said salary agreement in the books of the latter corporation thereby crediting the defendants A. P. Giannini and L. M. Giannini and said V. D. Giannini (now deceased) with sums aggregating \$925,000, nevertheless, all of the defendants together with all of the forty-four other persons listed as having been directors at one time or another of Transamerica are accused of wrong

doing because of acts done in conformity with the provisions of said agreement. While the plaintiff charges that all of the defendants and said forty-four other persons committed fraudulent and illegal acts—recitals which are but legal conclusions—her pleading fails to set forth with particularity the ultimate facts and circumstances constituting the alleged fraud and illegality.

What, if anything, the defendants, other than the three last above named, or any of these forty-four other persons had to do with the making of said salary agreement, in what particulars the acts of those defendants and the forty-four other persons who were directors of Transamerica at the time the latter assumed liability under said salary agreement constituted fraud or other wrongful conduct, whether plaintiff claims that all of the defendants and all of said forty-four other persons knew that the credit entries made between April 5, 1929 and the end of that year in favor of defendants A. P. Giannini, L. M. Giannini and V. D. Giannini (now deceased), were false and fraudulent or fictitious, or whether plaintiff seeks to charge that because some of the defendants and other persons possessed such knowledge, particularly those who knew of these book entries or at least attended meetings of the board of directors of Transamerica during the period last mentioned, therefore all of the defendants and all of said forty-four persons may be charged as a matter of law with having caused such entries to be made upon the books of said corporation, its subsidiaries, etc., the complaint fails to disclose. Instead, much is left to conjecture.

The foregoing series of alleged wrongs may be described as having stemmed from or as being in some way con-

nected with the alleged fraudulent salary agreement. It will also be observed that many alleged wrongful acts are charged in language rather general though sweeping in character. Likewise it is claimed that these alleged wrongs were perpetrated over a period comprising many years, during which not only one or another of several different boards of directors of Transamerica presumptively controlled the management of that corporation, but in addition what might be termed the primary wrong in this particular series appears to have been committed by the management of a different and earlier corporation, with which virtually all but very few of the defendants had nothing to do.

Further illustrating the multiplicity of transactions complained of we find that in paragraphs XXX to XXXIII, inclusive, plaintiff avers in substance that on or about December 17, 1932 at a time when Transamerica, its subsidiaries, etc., were engaged in a profitable investment and brokerage business, the defendants and said other persons, for the purpose of enriching themselves, particularly the defendants A. P. Giannini, L. M. Giannini and Claire Giannini Hoffman, and said V. D. Giannini (now deceased), and acting through defendant L. M. Giannini and said decedent, caused the defendant co-partnership of Walston and Company to be organized; that thereafter, during each of the years 1933 to 1938, inclusive, and acting through each of the several different boards of directors of Transamerica serving at the particular period involved, the defendants and said other persons caused Transamerica, its subsidiaries, etc. to divert all of its investment and brokerage business to said Walston and Company for the purpose of enriching themselves, particularly

the last four named parties; and that during said last mentioned period, acting through each of the several different Boards of Directors of Transamerica, serving at the particular period involved, the defendants and said other persons caused Transamerica, its subsidiaries, etc. to disburse from the funds thereof to said Walston and Co. large sums as brokerage fees in connection with the business diverted as aforesaid and, in addition, sums for use as capital for said Walston and Company, the same aggregating about \$548,000, all of which sums were thereafter distributed by said Walston and Company to said last four named parties.

Here too, it may be pointed out that according to the pleader the series of so-called Walston and Company frauds extended over a period of many years, and that during those years each of the several different boards of directors of Transamerica which happened to be serving at the particular time involved caused one or more of said acts to be committed. In this connection it should be added that all of the members of the co-partnership firm of Walston and Company, including the last four named parties, are listed among the defendants herein.

Still another series of alleged wrongful acts is found set forth in Paragraphs XXXIV to XXXVI, inclusive. Here plaintiff has alleged that at sometime during 1932 all the defendants and said forty-four other persons organized a certain private trust syndicate, suing Charles J. Smith and Margaret Mallory as trustees thereof, to engage in speculative operations in the stock of Transamerica and other securities; that sometime in the year 1932 all of the defendants and said forty-four other persons, acting through the then Board of Directors of Transamerica,

caused the latter corporation, its subsidiaries, etc., to advance from the funds thereof amounts aggregating not less than \$1,500,000 to the defendants A. P. Giannini and L. M. Giannini and said V. D. Giannini (now deceased); that these three used such funds to acquire the controlling interest in the stock of another corporation (originally known as Bankitaly Mortgage Company, but later its name was changed to Pacific Coast Mortgage Company); that in addition all defendants and said forty-four other persons caused Transamerica, its subsidiaries, etc., to advance from the funds thereof into the treasury of Pacific Coast Mortgage Company amounts aggregating not less than \$1,500,000, which were employed by the latter corporation during each of the years 1933 to 1938, inclusive, in carrying on speculative stock operations; also that such advances were made to further the personal interests of the three persons last named; that during the years last mentioned said Pacific Coast Mortgage Company collected as the result of such speculative operations profits aggregating not less than \$2,000,000 which from time to time were distributed to the three persons last named; and that all of the alleged wrongs last enumerated were accomplished secretly and were concealed through purported loans and other transactions to secret agents, including one A. O. Stuart and A. P. Giannini Company, a corporation.

Here it should be pointed out that the allegations embraced within paragraphs XXXIV to XXXVI are so phrased as to leave uncertain whether plaintiff claims that the total of all the advances made from the funds of Transamerica with respect to the so-called Pacific Coast Mortgage Company dealings amounted to the sum of \$1,500,000 or the sum of \$3,000,000.

An additional series of allegedly wrongful acts is described in paragraphs XXXVII to XXXVIII. It is there averred that during each of the years 1933 to 1936, inclusive, all of the defendants and said forty-four other persons, acting through each of the several different boards of directors of Transamerica serving at the particular period involved, caused that corporation, its subsidiaries, etc., to advance from the funds thereof various amounts aggregating not less than \$3,000,000 to said trustees Smith and Mallory for use as capital in conducting the business of the aforementioned trust syndicate; also that such capital was employed by said trustees and the beneficiaries of said trust syndicate for speculative operations in the stock of Transamerica and in other securities, resulting in large profits to said trust syndicate aggregating not less than three hundred thousand dollars; that from time to time such profits were distributed, to the detriment of Transamerica, its subsidiaries, etc., in the amount last stated; and that such advances were consummated secretly and were concealed through purported loans and other transactions to secret agents. Here likewise the pleading is indefinite, that is, it is not clear whether plaintiff contends that the aforementioned profits were divided among the particular three or four persons who are repeatedly singled out in the complaint or that such profits were distributed among all of the defendants and all said forty-four other persons.

Still further illustrating the multiplicity of transactions complained of, we find that in Paragraph XXXIX plaintiff charges that at some time during each of the years 1932 to 1937, inclusive, all of the defendants and said forty-four other persons, acting through each of the sev-

eral different boards of directors of Transamerica serving at the particular period involved, caused that corporation, its subsidiaries, etc., to engage in manipulating the market for the stock of said corporation, and that as a consequence Transamerica, its subsidiaries, etc., incurred expenses and sustained losses aggregating not less than \$2,250,000.

In Paragraph XL as well as in the various other portions of the second amended complaint are found recitals to the effect that all of the defendants and said forty-four other persons, acting through each of the several different boards of directors of Transamerica serving at the particular period involved, caused the various corporate transactions complained of to be kept by an intricate system of accounting, contrary to customary and proper accounting principles and beyond plaintiff's understanding, to such an extent that said transactions at all times were concealed by entries made under false, fictitious and misleading designations, also that some of the acts complained of were caused to be withheld by the same parties from the records of Transamerica, its subsidiaries, etc., and to be evidenced by concealed and private agreements.

Paragraph XLI is devoted to setting forth the facts and circumstances describing how plaintiff first discovered the various alleged wrongs hereinabove described. It is upon the allegations of that paragraph that plaintiff relies to excuse her delay in the commencement of this suit.

In substance plaintiff there asserts that at all times up until about April 27, 1939, the defendants and said forty-four other persons kept concealed from her all the corporate transactions of which complaint is made; also that during all such times she had no knowledge, information

or notice concerning the same, or respecting any wrongful conduct of the defendants or of said forty-four other persons concerning their management of the business of Transamerica or its subsidiaries or departments; that she reposed complete confidence in defendant A. P. Giannini and all of the directors and officers of Transamerica and its subsidiaries, etc., until about April 27, 1939, when for the first time a certain proceeding then pending before the Securities and Exchange Commission of the United States was called to her attention. In this connection it is further alleged that thereupon she investigated said proceeding and ascertained that under date of November 22, 1938, said Commission had ordered a hearing to determine whether the stock of Transamerica should be suspended or withdrawn from certain securities exchanges by reason of false and misleading statements, which did not correctly reflect the true financial condition of Transamerica and its subsidiaries and departments; that on the date last mentioned she for the first time ascertained the matters and charges contained in the order of said Commission directing a hearing to be had respecting the same and that a copy of such order was being tendered for filing to show the nature and extent of plaintiff's first discovery of suspicious circumstances concerning the wrongs complained of.

Plaintiff further alleges that prior to April 27, 1939, she had no knowledge, information or notice concerning the aforementioned proceeding before said Commission, and did not have reason to suspect any of the defendants or other persons of wrongdoing in the conduct of the business of Transamerica, its subsidiaries, etc.; also that said proceeding before said Commission is still pending,

and that the matters and charges referred to in said order of said Commission were developed slowly through detailed examinations and audits of the records of Transamerica and its subsidiaries, etc., by expert accountants on behalf of said Commission, and were presented to it by the testimony of unwilling witnesses through examination of the latter by experienced lawyers. Finally it is therein averred that immediately after making the aforementioned discovery plaintiff proceeded to investigate and at all times ever since has continued diligently to investigate to ascertain the true and complete facts respecting the conduct of defendants and said forty-four other persons as to their management and operation of the business of Transamerica and its subsidiaries, etc., but thus far she has been unable to complete such investigation and is still proceeding therewith.

A pleading must be construed most strongly against the pleader. The presumption is that the latter has stated his cause as strongly as the facts warrant. In view of plaintiff's admission to the effect that at all times since April 27, 1939, she had continued diligently to investigate to ascertain the truth concerning the conduct of the defendants and the other directors with respect to their management and operation of the business of Transamerica, and that although she had been so engaged for a period of approximately two and a half years, nevertheless, she had been unable to complete such investigation and was still carrying on the same at the time of filing her last amended complaint, there arises at least the inference that when she does conclude such inquiry plaintiff may discover one or more of her charges to be unsupported by the facts.

The accusations made herein are of a most serious nature. The period of time involved extends over a great many years. The good name of an exceedingly large number of individuals is under attack. Prior to the filing of the present suit two of the allegedly chief conspirators had died. Their legal representatives are included among the eighty-one defendants. Since the filing of the second amended complaint one of the defendants also has died. So far as the pleading discloses only four of the present defendants are residents of this district. Where the remaining individual defendants reside, or from what distances they may be required to travel in order to attend the trial of this cause, does not appear, except that they reside in California. The principal office and place of business of Transamerica are alleged to be in the City and County of San Francisco, namely in the Northern District of this State. For aught that now appears the meetings of its directors have taken place in the latter district. Doubtless many corporate records, more or less voluminous, will need to be transported from the corporation's principal office for the purpose of the trial. The plaintiff herself claims to be a resident of the State of New York. Just why this litigation should have been filed in this District is not clear.

Under these circumstances before the defendants are subjected to the burdens, financial and otherwise, which a trial of the charges aforementioned would impose, they are entitled to be apprised with reasonable definiteness, both as to what it is claimed was their specific participation in the acts complained of, also wherein it is asserted their particular conduct constituted a violation of plaintiff's rights. In any event, plaintiff's admission as above stated to the

effect that she is still endeavoring to ascertain the truth of the charges she has made herein furnishes a most convincing ground for applying strongly against the pleader the rule that in all averments of fraud the circumstances constituting the fraud shall be stated with particularity. (See Rule 9b FRCP.)

Turning now to the aforementioned order issued by the Securities and Exchange Commission under date of November 22, 1938—we find that the same embraces in substance the following matters. It is therein recited that Transamerica had registered its shares of capital stock on certain national exchanges by filing on August 7, 1937 a certain application with said exchanges and with said Commission, pursuant to Section 12 (b) of the Securities Exchange Act of 1934 as amended, and pursuant to Rule JB1 of said Commission. Said order further declares that said Commission, having reasonable ground to believe that Transamerica had failed to comply with the provisions of said Section 12 (b) as amended and of its rules, in that said applications contained false and misleading statements of material facts, including financial statements of Transamerica and its subsidiaries, which did not reflect the true financial condition thereof, all as more particularly set forth under the heading of eighteen separate items, said Commission ordered that a public hearing be held to determine whether Transamerica had failed to comply with the provisions of said Act and of its rules in the particulars set forth in said order, and if so, to determine whether it would be necessary or appropriate to suspend or to withdraw the registration of Transamerica's capital stock on said exchanges. In addition this order designates the officer to conduct said hearing, and fixes the time and place for holding the same.

A reading of the particulars specified under said eighteen items discloses that, except as hereinafter noted, they all related to certain entries in the books and records of Transamerica or one or more of its subsidiaries, which entries purported to reflect the financial condition of said corporations as of December 31, 1936, and appeared to said Commission to be false and misleading. These entries included such matters as a certain charge to "Paid-In-Surplus" resulting from cancellations and redistribution of capital stock, appearing in the balance sheet of Transamerica as of December 31, 1936, which item in the Commission's opinion should have been entered as a current expense chargeable to profit and loss. Another specification pertained to alleged similar erroneous charges entered in 1934 and in 1935. Still other specifications referred to such items as excessive valuations of assets, the failure to charge off certain entries as losses, inadequacy of reserves, and like matters.

In addition said order pointed out that in the aforementioned applications Transamerica had failed to disclose that three of its then directors—one of these died prior to the commencement of this suit—constituted a "parent" of said corporation by virtue of the fact that said three directors at that time held general stock proxies empowering them to direct the management and policies of Transamerica; and also that in said application Transamerica had failed to state that during the years 1930 to 1936, inclusive, it had made disbursements in various amounts as remuneration to a certain officer and director thereof, to-wit, the defendant A. P. Giannini. Respecting the latter item, said order declared that the Commission had "reasonable grounds to believe that on January 20, 1930,

the sum of \$1,400,000 was placed on the books of Bancitaly Company of America (then a subsidiary of Transamerica Corporation) to the credit of A. P. Giannini; that of this \$1,400,000 all but \$792,000 had been paid to A. P. Giannini, by September, 1931, at which time counsel for the then existing management of Transamerica Corporation advised that further payment would be illegal; that thereafter subsequent to the change in management in 1932, A. P. Giannini withdrew from the balance of \$792,000 the following sums:" (here followed a list of five annual disbursements made to defendant A. P. Giannini in each of the years from 1932 to 1936, inclusive.)

It is to be noted that nowhere in the aforementioned order did said Commission declare or even intimate there was reasonable ground to believe that any of the defendants had engaged in a conspiracy or in any of the alleged wrongful acts complained of herein. On the contrary, the above quoted excerpt from said order rather would imply that said Commission believed that the management of Transamerica at least as it existed in September, 1931, had challenged the legality of the aforementioned credits entered in favor of the defendant A. P. Giannini, also that the Commission found that in 1931 the then existing board of directors of that corporation had been hostile to and had prevented him from drawing any further sums under said credits, and further believed that it was not until some time after "the change in management in 1932" that he succeeded in withdrawing any additional sums on account of such credits.

Furthermore, in view of the fact that at the time of the filing of the second amended complaint, namely after

it had been conducting its investigation over a period of about four years, said Commission had not been able to conclude the same, nor had it been able to determine whether Transamerica had failed to comply with any of the provisions of the Securities and Exchange Act or of its rules, or whether it would be necessary or appropriate to suspend or withdraw the registration of Transamerica's capital stock on any of the national exchanges, it can hardly be said that said order of the Commission supports plaintiff's averment to the effect that the disclosures made in said order uncovered the alleged wrongful acts of which she complains in the present lawsuit.

Indeed the status of the proceeding before said Commission after the lapse of nearly four years as above described, and the further circumstance that the Commission's order, upon which plaintiff apparently mainly relies to justify the very long delay in the filing of the present suit, contains no recitals supporting the charges she has made herein, rather warrants the conclusion that if the bar of the statute of limitations or of laches is to be avoided it will be necessary for plaintiff to plead other facts besides those set forth in her second amended complaint.

In the concluding paragraphs of her complaint, besides alleging she has no plain, speedy or adequate remedy at law, plaintiff has undertaken to explain why it would be futile for her to demand of the directors or of the stockholders of Transamerica to institute action to redress the alleged wrongs on account of which she seeks relief, in other words, to justify her omission to make any such demand. Respecting such omission, plaintiff has charged that all those who had been members of the several dif-

ferent boards of directors of Transamerica during any of the periods mentioned in her complaint, including those serving at the time of the commencement of this suit, have been sued as defendants or otherwise have been accused of committing the alleged wrongs pleaded therein, also that at all such times the defendants and said forty-four other persons held and exercised control of the voting shares of stock of Transamerica, that knowing such facts plaintiff had made no demand on the board of directors of that corporation or of its shareholders to institute such action, as such a suit to be effective must be directed against all of the defendants and the forty-four other persons named in the complaint, and accordingly that such a demand would be a futile and idle act. In that same connection, it is further asserted that the outstanding shares of stock of Transamerica are held by approximately 200,000 persons residing in substantially all of the states and territories of the United States and in numerous foreign countries, that such a demand upon the stockholders to be effective would require an expensive and prolonged struggle with adverse boards of directors and persons to wrest control of such voting shares from them, and that such struggle would be a futile and idle act.

By the prayer of her complaint plaintiff seeks a decree declaring a trust relationship between each of the defendants and herself and also between Transamerica and the defendants; also that all defendants render an accounting of their dealings with the assets, etc., of Transamerica and of their acts as directors and officers thereof concerning the transactions complained of; that upon such accounting judgment be entered against each of the defendants in the amounts to which Transamerica and the plain-

tiff may be entitled, but not less than the sum of \$8,798,000, together with an attorney's fee and costs, plus such other relief as may be equitable.

Analyzing this pleading in the light of the prayer thereof it would appear that of the \$8,798,000 sought to be recovered herein, the sum of \$3,700,000 is claimed to represent losses sustained as the result of payments made by Transamerica, its subsidiaries, etc., pursuant to the provisions of the so-called salary agreement, also the further sum of \$548,000 is described as constituting the damages suffered on account of what may be termed the Walston and Company series of transactions, likewise the further amount of \$2,000,000 is asserted to reflect the damages resulting from the Pacific Coast Mortgage Company dealings, while the sum of \$300,000 is referred to as constituting the damages arising out of the so-called Smith and Mallory trust syndicate series of transactions, and the balance of \$2,250,000 is charged as representing the losses resulting from stock market manipulations in which Transamerica and its subsidiaries purportedly engaged.

The pleading we are here considering is long and prolix, comprising thirty-seven pages. It is replete with surplusage and repetitions as well as legal conclusions, including numerous recitals, more or less general, vague and indefinite, charging various acts of wrongdoing. Among these are accusations of fraud, bad faith, breaches of trust and of fiduciary obligations, and also misappropriation and conversion of corporate assets.

These alleged wrongs are asserted to have commenced with an allegedly fraudulent transaction entered into during the year 1927, in other words, nearly a decade and a

half prior to the filing of the present litigation. During that rather lengthy period there were changes in the management of Transamerica through the election of several different boards of directors. Virtually a majority of those defendants who have been sued by their true names and who had served as directors had ceased to have any official connection with that corporation during the respective periods when it is asserted that all but one of the transactions complained of were consummated.

While it is averred that, with the exception of a few of the partners of Walston and Company, all of the defendants sued by their true names, together with the forty-four other persons listed, had served at one time or another as directors of Transamerica during most of the period within which the alleged wrongs were committed, nevertheless, it is charged that each of the series of transactions complained of stemmed from some corporate act performed by the particular board of directors acting in that capacity at the specific time involved. In other words, but for some corporate step on the part of those certain defendants who functioned as directors at the particular period involved, none of the alleged wrongful transactions could have been effected.

While plaintiff's counsel have argued that all of the acts complained of constituted but a single conspiracy extending over a period of about fourteen years, we see no escape from the conclusion that by her pleading plaintiff has sought to charge—as hereinbefore outlined—the commission of several separate and distinct series of wrongs, each disconnected from all the others. We are not persuaded that the evidence which, for example, might tend to prove the so-called fraudulent salary agreement or the

alleged wrongs committed in carrying out the provisions thereof, would have any connection with the evidence pertaining to what has been described as the series of Walston and Company transactions, or would throw any light upon the Pacific Coast Mortgage Company dealings, or would be relevant to what has been referred to as the series of Smith and Mallory trust syndicate transactions, or would have any connection with the operations whereby it is claimed Transamerica sustained large monetary losses as the result of engaging in stock market manipulations.

Furthermore, we do not perceive upon what legal theory it may be held that under the facts alleged any one of the aforementioned series of transactions constituted a part of or was bound up with any one or more of the remainder. Nor has any case been cited which would support plaintiff's contention to the effect that alleged wrongful acts, done by certain individuals while carrying out their functions as directors of a corporation, may be charged against others who neither were directors at the time such corporate steps were taken nor were otherwise engaged in the specific transaction involved.

Hence we conclude that each claim founded upon a separate transaction, as hereinbefore outlined, should have been stated in a separate count, and that such separation would have facilitated the clear presentation of the matters set forth. (See Rule 10b, FRCP.)

In essence the argument advanced by plaintiff's counsel is analogous to that presented on behalf of the plaintiff in the case of *Bowman v. Wolhke*, 166 Cal. 121, 135 Pac. 37. In the latter case, as here, the complaint consisted of but a single count. It was there contended that such a pleading was proper, even though several distinct tortious

acts were complained of, the argument being that these several acts had been committed in pursuance of a single conspiracy. Overruling such contention, the Supreme Court of California there declared in part:

“The theory of counsel for plaintiffs is that by reason of the claim that all the acts were done in pursuance of a conspiracy, we have but a single cause of action stated in the complaint, a cause of action for damages for ‘conspiracy,’ and that any variety of wrongful acts whether ordinarily capable of being united in a single action or not may be so united if done in pursuance of a conspiracy. We are satisfied that this theory is irreconcilable with well-settled rules of law and can not be upheld. * * *

“* * * For instance, in 1 Cooley on Torts (3rd Ed.), p. 210, it is said: ‘The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. The damage is the gist of the action, not the conspiracy.’ In *Green v. Davies*, 182 N. Y. 503, 75 N. E. 537, 3 Ann. Cas. 310, it is said: ‘While it is true that in a criminal prosecution for conspiracy the unlawful combination and confederacy are the gist of the offense, not the overt acts done in pursuance thereof, * * * the doctrine does not apply to civil suits for actionable torts.’ (Citing cases.) * * * To use the words of another New York opinion, such a complaint does not show ‘a single, indivisible wrong, for which an action will lie’ but ‘an aggregation of certain tortious acts for each of which a separate action will lie for the recovery of the damages flowing therefrom.’ See *Kolel v. Eliach*, 29 Misc. Rep. 503, 61 N. Y. Supp. 937. * * *

That a corporation in the forepart of 1927 entered into an agreement with the president thereof to compensate him for his services on the basis of five percent of its net annual profits, including a guaranteed minimum salary of \$100,000 per year, did not of itself constitute a fraudulent or fictitious or pretended transaction. Likewise, the circumstances that a second corporation about two years later acquired all of the capital stock and all of the assets and assumed all of the liabilities of the first mentioned corporation, including said salary agreement, did not of themselves make such transaction fraudulent or fictitious or pretended. Again, the fact that either or both of these corporations caused credits to be entered upon their respective books or caused disbursements to be made on account of the provisions of said salary agreement—such acts would not, by themselves, become fraudulent or fictitious or pretended. For the pleader to label transactions of the type above mentioned as fraudulent, fictitious, pretended and as being without legal right or authority, would not be stating the ultimate facts from which, if proved, such legal conclusions might properly be drawn, but rather pleading the legal conclusions themselves.

The second amended complaint lists twenty-six corporations as subsidiaries of Transamerica. It is there averred that the latter corporations owned, controlled and operated each of these subsidiaries. As heretofore pointed out, plaintiff charges that as the result of a series of various alleged wrongful acts both Transamerica and also in some greater or lesser degree, these numerous subsidiaries sustained substantial losses.

In the light of the allegations and admissions in her pleading, and in view of the circumstances and conditions to which attention previously has been directed, we are persuaded that before it can be held that plaintiff has a cause or causes of action against the defendants or any of them, and likewise before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint.

The parties herein sued are entitled to be informed whether plaintiff claims that not only Transamerica but also each and all of these twenty-six subsidiaries, or if only some then which of the latter, acquired all of the capital stock and all of the assets and assumed all of the liabilities of Bancitaly corporation, including the alleged fraudulent salary agreement. Likewise, they ought to be apprised whether she asserts that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, entered upon their books credits and disbursed funds on account of the provisions of said agreement. Furthermore, they should be informed respecting the ultimate facts upon which the pleader bases her charges to the effect that said agreement and the other transactions mentioned were fraudulent, fictitious and pretended, and without legal right or authority. In addition they are entitled to be advised whether plaintiff claims that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, participated in the remaining series of alleged wrongful acts, including the so-called Walston and Company transactions, the Pacific Mortgage Company dealings, the so-

called Smith and Mallory trust syndicate transactions and the stock market manipulations.

Again, and for similar reasons the defendants are entitled to have plaintiff disclose whether she claims that all of them and also all of said forty-four other persons listed as having served at one time or another as directors of Transamerica, or if only some then which of them, held and exercised control of all of the issued and outstanding voting shares of capital stock of Transamerica, and also to set forth the ultimate facts upon which she bases such conclusions. Likewise, these litigants should be informed whether the pleader asserts that all of the defendants and all of the aforementioned forty-four other persons, or if only some then which of them, elected and completely dominated and controlled the several boards of directors of the latter corporation, and also should be given the ultimate facts upon which she bases these conclusions. In addition the litigants ought to be advised whether plaintiff asserts that each and all of the defendants, or if only some then which of them, had knowledge of the facts which she claims constitute the alleged frauds, etc., complained of, also whether such knowledge was actual or constructive, and when it is contended such knowledge was acquired.

Finally and upon similar grounds we believe that the defendants are entitled to have plaintiff state whether she claims that each and all of the defendants, or if only some then which of them, were conspirators, also which if any of the defendants were puppets but not conspirators, also which if any of them were neither conspirators nor puppets but failed to discover the alleged wrongful acts complained of, and which of the defendants though

neither conspirators nor puppets discovered such alleged wrongful acts and failed to take action thereon.

Plaintiff has amended her complaint twice. In view of this fact, and of the other circumstances and conditions previously noted, we have concluded that each and all of the respective motions to dismiss should be granted. We have further concluded that the appropriate procedure would be, instead of granting plaintiff unconditionally the right to file another amended complaint, to prescribe the conditions upon which she may apply for leave to file a third amended complaint.

Dated April 16, 1943.

Copies to counsel.